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**REPORTS
OF
C A S E S.
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ADMIRALTY,
COMMENCING WITH THE
JUDGMENTS
OF
THE RIGHT HON. SIR WILLIAM SCOTT,
Michaelmas Term 1798.**

By CHR. ROBINSON, LL.D. ADVOCATE.

VOLUME THE THIRD.

SECOND EDITION.

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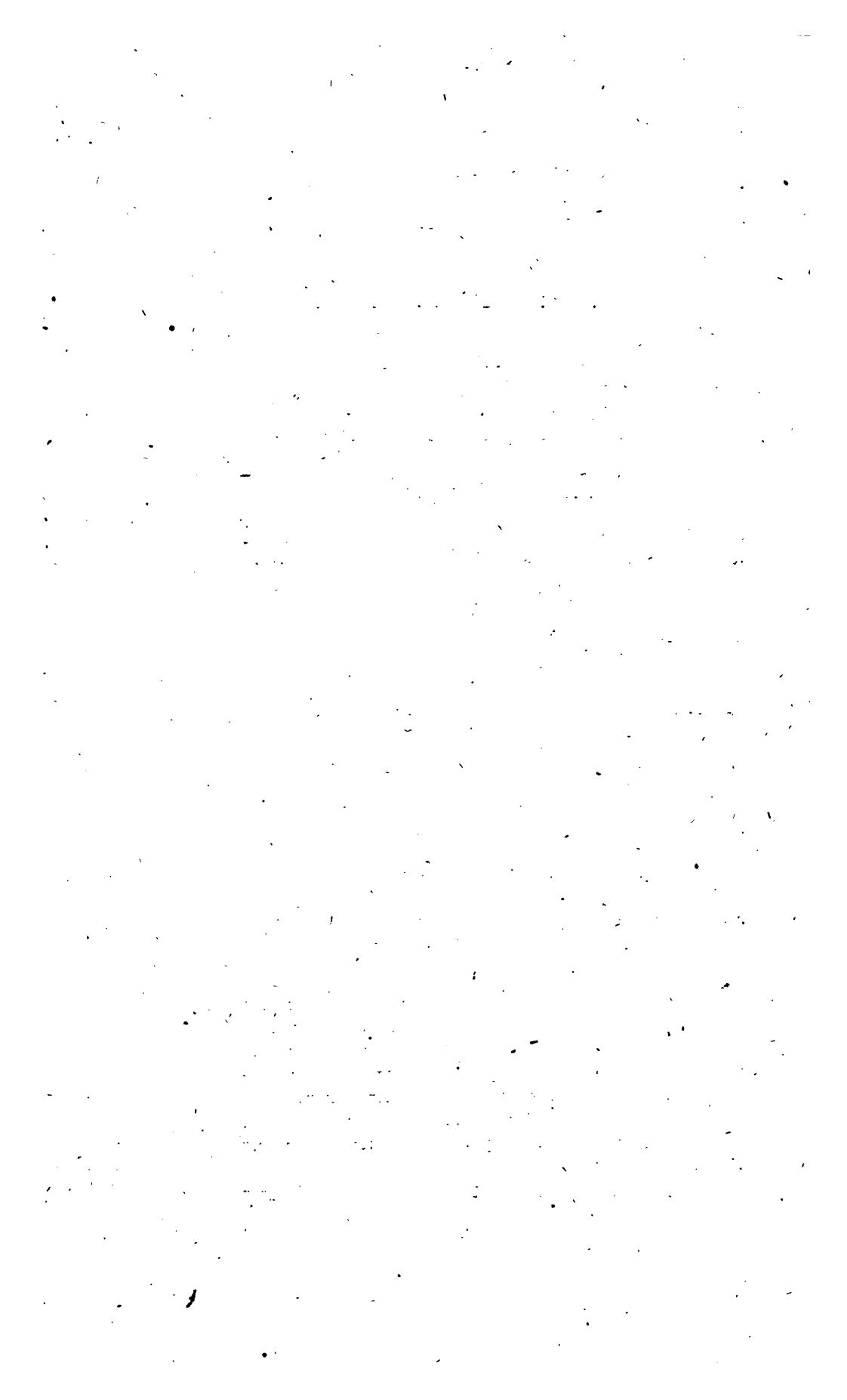
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ERRATA IN VOL. III.

Page 12, line 14, *for his own, read this country.*
Appendix, p. 1. line 12. *for proceeding, read practice*
p. 4. — 23. *for why it should not, read for any distinction on this point.*



R E P O R T S
OF
C A S E S
DETERMINED IN THE
HIGH COURT OF ADMIRALTY,
&c. &c. &c.

THE WAAKSAMHEID, VAN NIEROP Master.

June 27th,
1799.

THIS was a case on the admission of an allegation
of joint capture, in the capture of two Dutch
frigates by His Majesty's frigate the *Sirius*.

*Against the allegation, the King's Advocate and
Croke—The allegation admits that the ships claim-*

Allegation of
joint capture
admitted.
Convoying
ships how re-
stricted from
chasing, &c. by
the prize act.
Effect of not
giving signal of
an enemy in
sight, &c.

From the date of this case it would have been inserted in a
preceding number, had it not been mislaid. As it may be a
matter of great importance to the Navy, that no principle should
be omitted that may, in any degree, tend to produce a right under-
standing of their respective interests, between different parties
in His Majesty's service, it is introduced here without farther
apology, than may be necessary to account for the apparent
irregularity of dates.

CASES DETERMINED IN THE

The
WAKSAM-
HEID.

June 27th,
1799.

ifig as joint captors had a convoy under their protection, from which it is to be inferred that they were, in some measure, disqualified from giving assistance, in respect to the difficulty of doing it; but it is apprehended they are still more incapacitated from claiming under such an act, as an act illegal and prohibited under the prize act. The twenty-third article of that act of parliament expressly enacts, "That if any captain or other commander of any of His Majesty's ships or vessels of war, having transports or merchant ships, or vessels under convoy, shall wilfully desert, or sail away from them in pursuit of, and with the view of capturing any ship or vessel (other than ships or vessels armed and fitted for war only, and which shall be seen hovering about, or bearing down upon such convoy), or having captured a prize, shall wilfully desert the convoy for the purpose of carrying his prize into port, or if the commander of any ship or vessel whatsoever, having His Majesty's dispatches on board, shall sail out of his proper course in pursuit, and with the view of making prize, of any ship or vessel of the enemy, and shall be duly convicted thereof by sentence of a court-martial, such a commander shall forfeit his share of all and every such prize to His Majesty, for the use of *Greenwich hospital*."

This article, therefore, expressly forbids them to desert the immediate duty entrusted to their care; and they could not, consistently with their duty, have given assistance in the contest, if there had been occasion for it. But the allegation farther admits that they were sailing in a contrary direction to the chace, therefore no claim arises from presumptive

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presumptive assistance; all presumption is entirely repelled by a contrary course (*a*), as it has been determined in several cases. It was not even known to the *Scorpion*, whether the ships were enemy's or not; under these objections, the parties cannot entitle themselves to any benefit of joint capture; and therefore it is hoped the Court will reject the allegation in the first instance.

The
WAATSAM-
HEID.

June 27th,
1799.

In support of the allegation, Laurence-- The objection from the prize act, that we should have been guilty of a criminal desertion of our duty if we had given assistance, will not apply to the circumstances of this case. The whole transaction took place immediately in view of these vessels, and so near as to make it necessary for them to take some offensive measures for their own safety. The prize act says, "if any commander shall wilfully desert and sail away from"---words which cannot be meant to restrain convoying ships from looking out, and taking any thing that falls within their course. As little can any objection be drawn from the authority of those cases in which claims have been rejected on account of a voluntary abandonment, and increasing separation from the chace; as was the case of the *Powerful*. That such an abstention, or holding off from the contest,

Lords, 29th May
1795.

(a) In the Black Book of the Admiralty, A. 19, there is an article regulating the distribution of prizes, which, in its conclusion, lays down this principle, as agreeable to the ancient maritime law.

"*Et iceulz de la Flotte, qui sont hors de veue au temps de la Prise, n'auront nulle part d'icelles, s'ilz ne sont seyglants vers la Prise et dedens la veue, par ainsi qu'ilz soient semblables d'aider aux captours de la prise avec leur voilles, se mestier estoit, &c.*"

CASES DETERMINED IN THE

The
WAAKSAM-
HEID.

June 27th,
1799.

should disqualify the person voluntarily so doing from sharing in the benefits of capture, is as a general principle most just. But is there any such voluntary abandonment in this case? by no means. The utmost distance during the whole chace was not more than eleven or twelve miles, by no means sufficient to prevent the effect of assistance by intimidation and encouragement. That the effect of intimidation was produced appears from what followed. The Dutch frigates, one of 36, the other of 26 guns (of which, therefore, the former was alone of equal force with the *Sirius*), separated, on seeing so many ships in sight; and by that means rendered the capture more easy and more certain. But it is a material feature in this case, that it was owing to captain *King*(a), himself only, that more effectual assistance was not given. There can be no doubt about the intention of these parties. A signal of enquiry was made to him from the *Fairy*, which was not answered as it ought to have been, by informing her of an enemy in sight. It is the duty of all vessels to hazard as little of the certainty of victory as possible. They ought to give the signal of an enemy, and take all assistance they can obtain. If they do not, and a person is prevented by that means from joining the battle, the worst public consequences may arise. The interest of the country may be sacrificed to a rash pursuit of fame or private advantage; the object may be frustrated, or even if obtained, that advantage which might have been safely and easily obtained, may be, by such means, purchased at last at the expence

(a) Commander of the *Sirius*.

of

HIGH COURT OF ADMIRALTY.

The
WAAKSAM-
HEID.

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1790.

of a severe contest, and the necessary consequences attending it, the loss of many lives. In this respect it must necessarily be a part of their public duty to the country to accept assistance; and with respect to the persons who might have had an opportunity of affording it, it is obviously just that their situation should not be made worse, by a failure of duty on the other part. The laws of the country have considered persons in the situation of these parties, as persons naturally expected to share in the danger of the combat, and as such entitled to participate in the fruits of it. It is not intended to impute any intentional, and much less any unfair suppression of ordinary notice to captain *King*; but still the effect being the same, that it was owing solely to that suppression that the parties were not immediately up at the capture; it is apprehended they are clearly entitled to substantiate their plea by evidence; as one, that if proved, will be sufficient to establish for them an interest in this capture,

JUDGMENT.

Sir *W. Scott*--This is a case on the admission of an allegation of joint capture; and although it is usual for the Court in those cases where the facts, if proved, would not be sufficient to sustain the claim, to consider it as an act of kindness to the parties to reject the allegation *in limine*, rather than suffer them to incur the expence of a litigation, from which they can derive no possible benefit: yet on the other side, unless the Court is clearly and decisively of opinion, that they can in no degree, and by no possible proof entitle themselves to advantage; it will not prevent them from

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WAASAN-
HEID.

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1799.

going into the merits of their case. If there is any doubt remaining, whether circumstances may not appear that shall have a favourable effect, or if there is any mode by which they may probably entitle themselves, the Court would not totally reject their allegation.

The allegation states, "that the *Scorpion* sailed from *Cuxhaven*, 2d *October* 1798, in company with the sloop of war the *Fairy* and the brig the *Kite*, having eleven merchantmen under their convoy; that on the 24th of *October* at day-light, they discovered two sail on the weather bow, which turned out to be the *Sirius* and the enemy's ship afterwards captured a-head of her; that the *Scorpion* and the *Kite*, two of the convoying ships, were immediately dispatched to examine; that they sailed on till they came within seven miles of the *Sirius*, the *Dutch* ship being at that time about two miles a-head of her; that the *Scorpion* made the usual signal to the *Sirius*, and received an answer so as to know her to be the *Sirius*, but that no signal was made, that the ships a-head were enemies; that they were, therefore, concluded to be friends; and accordingly such a signal being made to the *Kite* and *Fairy*, the *Fairy* immediately made a signal to recal the *Scorpion*; the allegation pleads, besides, that the *Sirius* ought to have given the signal of an enemy a-head.

On these facts I am of opinion that the acts of these vessels are not to be considered as a description of the convoy, or as coming under the censure of the act of parliament. On the discovery of enemies ships it behoved the convoying vessels to watch their route and manner of disposing of themselves. The *Fairy* sent

HIGH COURT OF ADMIRALTY.

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sent the two others to reconnoitre, staying herself with the convoy. This is rather to protect them in the best manner, to ascertain the size and nature and route of the ships occasioning the alarm. The act of parliament uses the words "sailing away from," but these are not to be taken too literally, so as to include every sally or excursion that is made; that would in strict terms be *to sail away*, but could not be considered as within the meaning of the act, in cases where it may be necessary either to reconnoitre, or even to capture, ships hovering round, and which otherwise might, perhaps, capture some of the convoy.

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WAKESAM-
HELD,

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1799.

The conduct of the convoying ship, in this instance, cannot be brought under the act, although it might have been so, if the chace was to be continued to any great distance; then it might be something like a desertion of duty. But in this case the sailing away was only to ascertain the nature of the ships in sight, and merely for that purpose; and when that was ascertained, the *Fairy* made the signal of recal. It is intimated that if this signal of an enemy had been made, the signal of recal would not have been given, for that the elongation of these two ships from the convoy was not so great but that they might have chased further without desertion of their duty; and it is moreover intimated that the *Sirius* ought, by the rules and practice of the navy, to have made this signal of an enemy. If these two facts are proved, then their discontinuance of the chace and alteration of the course is not an act of their own, but an act wrongfully occasioned by the neglect or mistake, or wilful omission on the part of the *Sirius*; and being so, it would

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WAASAN-
HEID.

June 27th,
1799.

Lords, April
12th, 1785.

not have the effect which generally would follow upon a discontinuance of chace and alteration of course, before the act of capture took place; for generally a discontinuance and alteration would defeat the interest of a joint captor, by destroying the presumption of assistance or intimidation. In the case of the *Herman Parlo*, it was suggested that the actual captor had extinguished his lights in order to prevent other ships from seeing the chace or capture; and the superior Court held that no effect should be given to any conduct on the part of the other ships so produced; and that the other ships though not in sight, nor actually chacing, should share. I will not suggest that captain *King* intended any deception, but if the signal *ought* to have been made, and was from neglect or inattention not made, the conduct of the other ships in discontinuing the chace and altering their course was as much produced by that neglect or inattention, as it could be by the fraud imputed in the other; and the effect being the same, the same legal consequence would follow.

It is further alleged, as a strong circumstance in favour of the claim, that in consequence of these ships appearing in sight, the *Dutch* frigates (for there were two in company) parted, and were by that means more easily taken separately. The natural supposition is, certainly, that they would have kept together and engaged a single enemy: but if it can be proved that the separation took place in consequence of any intimidation conveyed by these vessels, it may entitle them: I shall admit the allegation, but the parties must prove the whole case. They must prove that it was the duty of captain *King*,

HIGH COURT OF ADMIRALTY.

King, according to the practice of the Navy, to have made the signal of an enemy in sight; and they must prove also, that the intimidation on the *Dutch* was produced from their appearance; more especially as it is suggested that there were other *British* vessels in sight. They must likewise shew that the capture was made, within such a distance as would not totally have removed them from the fair limits of their convoy duty. If they can prove all this, they may, I think, entitle themselves.

The
WAAKSAM-
HEID.

June 27th,
1799.

THE FURIE, PLEIT Master.

June 27th,
1799.

THIS was a case on the admission of the allegation, as to the other *Dutch* frigate, alluded to in the preceding case.

On this case it was submitted, that although this capture was made out of sight, the parties were still entitled on the same principle, "that the capture was made in consequence of the separation of the *Dutch* frigates; and that the separation was occasioned by the intimidation conveyed from the appearance of the vessels.

Allegation of joint capture rejected—connected with the preceding case.—Convoying ships precluded from sharing by further elongation from their convoy, &c.

On the other side it was said, that the *Waaksamheid* was taken at nine in the morning; but that this frigate was not taken till nine in the evening, and not till after she had sustained an action; that therefore all the effect of presumptive assistance was extinguished and superseded by the distance and actual contest.

Court.---There is also another reason why they cannot entitle themselves to share in this capture, arising

The
FURIE.

June 27th,
1799.

arising out of what I observed on the former case : there must have been a farther elongation from the convoy, before the convoying ships could, under any suggestion, have assisted in this capture: if they had not been convoying ships, I should have thought their claim sustainable in this case also ; for although it is going a little farther than the last case, it is not farther than the principle on which the other case was determined would carry us. If it had been by the act of the *Sirius* only, that they were induced to discontinue the chace, they might still be entitled ; but as they were convoying ships specially associated for the protection of their convoy, they could not have pursued so far without a breach of that special duty: on these grounds I shall hold them to be excluded from sharing in this capture ; and therefore I reject this allegation,

Feb. 27th,
1801.

NOSTRA SIGNORA DEL ROSARIO, MARTINEZE Master.

British prize ship fitted out for war by the enemy, is not to be restored to former owners.—Condemnation to the captors.

THIS was a case of a British prize ship which had been taken by the Spaniards, and sent out as a merchant ship, with a letter of marque.

The King's Advocate stated the history of this vessel to have been, that she was an English ship, which had been taken by the French and carried to Cadiz, and there sold to the Philippine Company; that she was afterwards taken on a voyage to the Manillas by an English cruiser, carried to Gibraltar, and

and condemned; that she was again bought for the *Philippine Company*, and was proceeding at the time of the present capture to *Lima*, with a letter of marque, and carrying a valuable cargo of wines, stated to be worth 40,000*l.* The papers and depositions fully proved the ship and cargo to be *Spanish* property. The condemnation of the cargo was moved, and passed, without any observation.

The
NOSTRA
SIGNORA DEL
ROSARIO.

Feb. 27th,
1801.

On the ship. *The King's Advocate* submitted, that although the vessel appeared to have been a *British* prize ship, there were two grounds on which the captors were entitled to have her condemned to them; first, that she was fitted out for war; and secondly, that the condemnation to the former captors at *Gibraltar* must be taken to have divested the original *British* proprietors of their interest.

Court.--The first ground is fully sufficient. Was there a commission of war?

King's Advocate.--Yes; the master says to the second interrogatory, that he had a commission from the King of *Spain*, but that he had orders from his owners to interrupt no vessel, but to proceed direct to *Lima*: on the thirty-first interrogatory, it appears that he had twelve guns on board.

Ship and cargo condemned to the *captors*.

Feb. 27th.
1801,

THE INDIAN CHIEF, SKINNER Master.

National character of Mr. Johnson, settled in England as American consul, removing, in transitu, during a voyage to the enemies colonies, &c,

THIS was a case of a ship and cargo seized in the harbour of *Cowes*, on a voyage from *Batavia* to *Hamburg*, in which two questions arose, respecting the national character of Mr. *Johnson*, claimant of the ship, and of Mr. *Miller*, claimant of the cargo.

For the Captors, King's Advocate.--The ship is claimed on behalf of Mr. *Johnson*, as an *American* subject, having been taken on a voyage commencing at *London* 1795, to *Madeira*, from thence to *Madras*, *Tranquebar*, and *Batavia*, and back to *Hamburg*. As the property of an *American* subject, so employed in a trade from the colonies of the enemy to ports not of his own country, nor to the ports of his own country, it would be liable to the objection of being engaged in an illegal commerce: it must at least be subject to the question of law, which is reserved in this point in other cases: but the more immediate objection to which this ship is liable, is, that it is the property of a *British* subject, and therefore liable to confiscation, for being engaged in trading with the enemy. The circumstances of Mr. *Johnson*'s history which affect his national character, are these; he was born in *America*, but left that country so long ago as 1771, and settled as a merchant in this town. During the *American* war 1778, he left *England*, and settled in *France* as one of a house of trade, reserving to himself, in the articles of partnership, the liberty of returning to *America* when he thought proper,

The
INDIAN
CHIEF.

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proper. In 1785, however, Mr. *Johnson* returned again to *England*, and continued in *England*, as a merchant of this place, till *September* 1797; during the latter part of that period, from 1790, he acted as *American* consul in this country, but till that time he had no sort of *American* connection superadded to the character which a person naturally acquires by residence: whether he was invested with that title, or not, is perfectly immaterial as to the legal effect of determining his national character; as it has been decided, in various instances, that the national character of a consul is not affected by the title he bears, but is to be judged of simply as the character of other merchants, by residence, and the various other circumstances that constitute the character of other persons. The affidavit that has been brought in from Mr. *Johnson*, states, "That Mr. *Johnson* considered himself as an *American* subject, and that the *American* government considered him as an *American* subject, and declared him so to be by an act of the government, *January* 15, 1785, and that he always entertained an intention of returning;" but it is not on the bare intention, nor on the understanding of particular persons, that the Court will judge. The Court will look to the great facts of the case; and it will find them to be, that Mr. *Johnson* lived in this country twenty-six years; that he did not remove himself from his *British* residence till the month of *September* 1797, two years after the commencement of this transaction; the voyage began in *March* 1795, and the capture did not take place till *November* 1797; during that time the vessel is to be considered *in transitu*; and it would be opening

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opening a wide door to fraud, if persons engaged in illegal transactions could be allowed to disengage themselves from the penal consequences of those acts, by a mere removal whilst the property is *in transitu*, and just before they may expect to reap the profits of their illegal commerce: on these grounds it is submitted, that Mr. Johnson is to be considered as a *British* merchant during the time of this voyage, and that as such he has exposed his property in this vessel to confiscation, by engaging in trade with the enemies of this country.

On the part of the Claimant, Arnold and Sewell.— As to the illegality of the purpose with which this ship set out, considering Mr. Johnson as an *American* subject, it is not immaterial to observe, that it was not agreeable to his intentions, nor in consequence of any directions coming from him, that the ship was to return to *Europe*: she went out under the management of Mr. Hewlet the supercargo, with full powers committed to him to charter the vessel in the *East Indies*; as the second attestation of Mr. Johnson states, "that it was his design the ship should go from the *East Indies* to *America*, if an advantageous freight could be obtained:" it was at *Madras* that the present engagement was entered into by Mr. Hewlet, who is a young man, and might not foresee all the consequences of such an engagement; parties are in general undoubtedly answerable for the acts of their agents, but this rule is not to be held so strictly as not to be subject to favourable exceptions, especially in cases like the present, where there was no intention at all imputable to the principal, that the matter

matter in question should be so conducted, and where it has arisen from error rather than fraud on the part of the agent himself; as it is evident that if there had been any conception of an illegal traffic against the laws of this country, on the part of the persons concerned in it, the vessel would not have come voluntarily into a port of this country. The principal question that has been made, however, respects the national character of Mr. Johnson: It is said, that Mr. Johnson's removal did not take place till 9th of September 1797, a short time previous to the capture of the vessel, 1st of November 1797, and it is said that he is entitled to no benefit from the bare and latent intention, which he describes himself to have entertained long before, of returning to *America*: So far is it from being a latent intention, that it is evident, in a letter written in *March* preceding to his creditors respecting his effects, in which he expresses an anxious wish to remove himself and family entirely to *America*, and states the terms on which he hoped to obtain their permission: subsequent to that time, he stood only under the creditable motive of not removing without his creditors consent. In September 1797, however, he had actually abandoned this country, and he had done every thing in his power to quit this country from the moment that he set foot on board the vessel to return to *America*. From this time he is to be considered as an *American*; as to any fraud to which such an allowance may be exposed, the Court will be on its guard against such attempts when they appear; but it will not determine a present case, where there can be no suggestion of such a design, by anticipation of

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of circumstances of a different nature which may possibly appear in other cases.

The only imputation of fraud that could be raised in this case would be, that it was a mere temporary and colourable removal; but that cannot be suggested: Mr. Johnson's intention, founded on the fairest, most natural and most credible motives, still continues; and that it was not hastily taken up, appears from the terms of the partnership in *France*, 9th June 1781, in which it is expressly stipulated, that he should be at liberty to remove to *America*, on giving due notice, and that on that event the partnership should cease. As to the mere legal effect of such a removal *in transitu*, as it is called, there are cases in which restitution has been allowed, in situations much stronger against the claimant than the circumstances of the present case. In the case of Mr. *Curtiss*, he himself was in the enemy's country at the time of capture, but on proof of his real intention of returning to *England* his property was restored to him; and in the case of *Haassam* and *Ernst*, Mr. *Ernst* was resident in *Amsterdam* at the commencement of the transaction; but it being a temporary residence, and his intention of returning to *Copenhagen* being proved, he obtained restitution of his share.

Pair American,
Adm. 1796.

In the case of Mr. *Dutilh* also, he has obtained restitution (a), though at the time of sailing, he was resident in the enemy's country.

(a) But see also, the *Hannibal* and *Pomona*, *Lords*, 8, 1800, in which his property was condemned according to the circumstances of his residence, at the time of capture.

JUDG-

JUDGMENT.

Sir *W. Scott*--This is the case of a ship seized in the port of *Cowes*, where she came to receive orders respecting the delivery of a cargo taken in at *Batavia*, with a professed original intention of proceeding to *Hamburgh*; but on coming into this country for particular orders, the ship and cargo were seized in port. It does not appear clear to the Court, that it might not be a cargo intended to be delivered in this country, as many such cargoes have been, under the *Dutch* property act: I mention this to meet an observation that has been thrown out, "that it is doubtful whether the ship might not be confiscable on the ground of being a neutral ship coming from the colony of the enemy, not to her own ports, or to the ports of this country." I cannot assume it as a demonstrated fact in the case, that the cargo was to be delivered at *Hamburgh*.--The vessel sailed in 1795, and as an *American* ship with an *American* pass, and all *American* documents; but nevertheless if the owner really resided here, such papers could not protect his vessel: if the owner was resident in *England*, and the voyage such as an *English* merchant could not engage in, an *American* residing here, and carrying on trade, could not protect his ship merely by putting *American* documents on board; his interest must stand or fall according to the determination which the Court shall make on the national character of such a person.

There are two positions which are not to be controverted; that Mr. *Johnson* is an *American* generally by *birth*, which is the circumstance that first impresses itself on the mind of the Court; and also

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by the part which he took on the breaking out of the *American* war. He came hither when both countries were open to him; but on the breaking out of hostilities, he made his election which country he would adhere to, and in consequence thereof went to *France*. As to the doubt that has been suggested, whether he would be deemed an *American*, not having been personally there at the time of the declaration of the independence of that country; I think that is sufficiently cleared up, by the circumstance of his being adopted as such by the act of the *American* government, declaring him and his family to be *American* subjects, and by the official character which that government has intrusted to him; I am of opinion, therefore, that he has not lost the benefit of his native *American* character. He came however to this country in 1783, and engaged in trade, and has resided in this country till 1797; during that time he was undoubtedly to be considered as an *English* trader; for no position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country; I should therefore have no doubt in pronouncing that Mr. *Johnson* was to be considered as a merchant of this country, at the time of the sailing of this vessel on her outward voyage. That leads me to take a view of the circumstances of this case; the ship went out in 1795 with Mr. *Hewlet* on board, and Mr. *Johnson* says, "he sent out Mr. *Hewlet* as supercargo, and put the vessel under his controul to take freight for *America*, but that his designs were frustrated by various circumstances;" and the ship actually went to

Madeira,

Madeira, Madras, Tranquebar, and Batavia; and from thence to *Cowes*, where she was arrested.

Now there can be no doubt that if Mr. Johnson had continued where he was at the time of sailing, if he had remained resident in *England*, it must be considered as a *British* transaction; and therefore a criminal transaction, on the common principle that it is illegal in any person owing an allegiance, though temporary, to trade with the public enemy. But it is pleaded that he had quitted this country before the capture, and that he had done this in consequence of an intention which he had formed of removing much earlier, but that he had been prevented by obstacles that obstructed his wish: to this effect the letter of *March 1797* is exhibited, which must have been preceded by private correspondence and application to some of his creditors. It does, I think, breathe strong expressions of intention, and of an ardent desire to get over the restraint that alone detained him; and it affords conclusive reason to believe that if he had been a free man, and at liberty to go where he pleased, he would have removed long before; and that he was detained here as a hostage, as he describes himself, to his creditors, on motives of honor creditable to his character. On the 9th of *September 1797* he did actually retire; of the sincerity of his quitting this country there can hardly be a doubt entertained; it is almost impossible to represent stronger or more natural grounds for such a measure; and I do not think the Court runs any risk of encountering a fraudulent pretension, put forward to meet the circumstances of the moment, without any thing of an original and *bonâ fide* intention at the bottom of it.

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The ship was sent out under the management of the supercargo, and it is said that Mr. *Hewlet* exceeded his commission: The affidavit does not go so far; it does not appear from that that the agent had not the power to enter into such an engagement; but this, I think, appears clearly, that it was the understanding both of Mr. *Johnson*, and of his agent Mr. *Hewlet*, who had been his clerk, and to whom he refers for a confirmation of his avowed design of removing, that before the completion of such a voyage Mr. *Johnson* would be in *America*; therefore if the illegality of the voyage must be supposed to have presented itself to their minds, as a *British* transaction, owing to Mr. *Johnson*'s residence in *England*, there was reason enough for them to conclude that Mr. *Johnson* would be removed; and, on that view of the matter, although it is certain that an agent would bind his employer in such a case, there is ground sufficient to presume that the agent acted fairly and *bonâ fide*, and under the expectation that Mr. *Johnson* would be returned to *America*.

The ship arrives a few weeks after his departure; and taking it to be clear, that the national character of Mr. *Johnson* as a *British* merchant was founded in residence only, that it was acquired by residence, and rested on that circumstance alone; it must be held that from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an *American*: The character that is gained by residence ceases by residence: It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion, *bonâ fide*, to quit the

the country, *sine animo revertendi*. The Courts that have to apply this principle, have applied it both ways, unfavourably in some cases, and favourably in others. This man had actually quitted the country. Stronger was the case of Mr. *Curtissos*; he was a *British*-born subject, that had been resident in *Surinam* and *St. Eustatius*, and had left those settlements with an intention of returning to this country; but he had got no farther than *Holland*, the mother country of those settlements, when the war broke out (a). It was determined by the Lords of Appeal, that he was *in itinere*, that he had put himself in motion, and was in pursuit of his native *British* character: and as such, he was held to be entitled to the restitution of his property. So here, this gentleman was in the actual pursuit of his *American* character; and, I think, there can be no doubt that his native character was strongly and substantially revived, not occasionally, nor colourably, for the mere purposes of the present claim; and therefore I shall restore this ship.

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The Snelle
Zeylder, Lords,
April 25, 1783.

(a) The order of reprizals against *Holland*, issued Dec. 1780. The *Snelle Zeylder* was captured 1st Jan. 1781; Mr. *Curtissos* had gone to *Surinam* in 1766, and from thence to *St. Eustatius*, where he staid till 1776; from thence he went to *Holland*, to settle his accounts, and with an intention, as was said, of returning afterwards to *England*, to take up his final residence; but he did not return to *England* till 27th April 1781.—The ship and goods had been condemned in the Court of Admiralty, 5th March and 10th April 1781, as *Dutch* property, (as it was stated in the appeal), unknown to Mr. *Curtissos*.

Some other claims of Mr. *Curtissos*, had been brought before The *Jalousie*.
the Court of Admiralty, and were restored on a full disclosure of The *Vrow Ma-
ria, Radau*,
the circumstances attending his situation, before the decision of Feb. 19, 1782.
the Lords in the *Snelle Zeylder*.

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National character. Mr. Millar, resident in Calcutta as American consul, deemed a British merchant; his property taken in trade with the enemy condemned.

In the same case.

As to the cargo, on a claim given on behalf of Mr. Millar, an asserted *American* subject, and *American* consul resident at *Calcutta*.

On the part of the captors, the King's Advocate contended that Mr. Millar had been a long time resident at *Calcutta*; that he was described by the supercargo (to the 12th interrogatory), as being the sole owner of this cargo, purchased in the enemy's colony; and that on these grounds his claim could not be sustained.

On the part of the claimant, Arnold and Laurence-- It is not contended that a person living in a foreign country, and carrying on trade there, would be privileged by the character of consul of another state, or protected from having his national character determined by the place of his residence; but in this case a more important question arises, on which it is contended on the part of Mr. Millar, that he would not acquire the *British* character by a residence in *Calcutta*. To invest a person with a national character arising from residence, it is necessary that such residence should be within the limits of the territory of the country; in this respect therefore, there is a material difference between a residence in *Calcutta*(a), and a residence within the dominions of a sovereign state in *Europe*. The dominion and rights of sovereignty of *Calcutta* have never been assumed by this government, even through the medium of the *East India Company*,

(a) A case has lately occurred before the Lords of Appeal, in some respects, similar to the present, on a claim of *Armenian* merchants resident in *Madras*, for property taken in trade with *Mannilla*.—See the *Angelique*, *Streng*, Appendix B.

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who possess the beneficial interest in those parts; they hold whatever they possess by a sort of sub-infeudation under the Mogul, in whom the sovereignty still resides; and it has been an object of great care and delicacy always on the part of this country, to avoid the use of any terms in public instruments, that might appear to militate, in any degree against those sovereign rights.

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Court.—Was there not a determination of the King's Bench, that our navigation laws extended to our settlements in that country; and was it not found necessary to pass a particular act of parliament to liberate vessels seized there for a breach of those laws?

Counsel.—As to *British* subjects it is apprehended that might very fairly be allowed, without affecting the argument in this case. *British* subjects can hold nothing over which the government of this country may not have a sovereign and superintending power; and the regulations of trade in respect to *British* subjects there are as broad and sweeping as they could be here; they have been the same at all times since our first establishment on that coast, and whilst we held only a fort and factory, merely as zemindars of the country; but the question respecting a foreign residence there, is very different from that, which depends chiefly on the quality of an original *British* merchant, settling there under the immediate protection and regulation of his own country: a local submission there must be in either case, from the first law of nations, in respect to the peace and order of society; if a foreigner is guilty of a disturbance of the peace, he would be

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amenable to the local justice of the place; but he would not by that means acquire a national character, any more than natives of the countries of the east, living within our settlements: They do not acquire a *British* character by living under our settlements, nor are they amenable to *British* laws. How then can it be said, that a foreigner of another nation would acquire a national character more than these natives: the *Danes*, it is notorious, having no possessions, but only a factory, live about the country, without acquiring the *British* character. The *Americans* more particularly, seem excluded from all benefit of residing there, by the 13th article of the treaty between *America* and this country, 1794, and therefore to subject them to inconvenience from such a residence, without allowing them to derive any privilege from it, would be manifestly unjust. As to the particular situation of this gentleman in *Calcutta*, it is farther observable, that it differs materially from consuls carrying on trade in countries where they reside. Mr. *Millar* does not appear to be connected in any way with the trade of *Calcutta*: he was living there merely as an official person, not engaged in the trade of that country; it was surely competent to him to give directions from thence, for any trade that he might carry on with other parts of the world. But taking him to be an *American*, a second question has been introduced, whether he does not fall within the scope of the order of council, which permits neutrals to trade from the colony of an enemy to their own ports only; and whether that order does not apply to the settlements in the *East Indies*, as well as to the *West*. To maintain such

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an interpretation would be a most unjustifiable extension of the spirit of the order. The words are, Islands and Settlements. But it is to be remembered that the order was substituted in the place of two other orders applying directly to the *West India* islands. After *Holland* and *Spain* had become enemies, the term Islands did not correctly apply to the nature of their colonies in the *West Indies*, and therefore the term was altered; but without giving ground to say, that it was intended to prevent neutrals from carrying on a trade from the *East Indies*, except to their own ports. Does it rest on the common principle? Was it a trade ever prohibited in time of peace? The principle of restriction in the *East India* trade was, that it should be restricted to one company exclusively, as far as the trade of this country was concerned; but the prohibition did not extend to prevent other neutral nations from trading there. To slip in such a prohibition by a mere construction of the later order of council, which was itself substituted only in the place of others, (which in their terms expressly negatived such an inference), is an assumption to which the Court will not accede.

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In reply, the King's Advocate said, It was unnecessary to enter into a nice distinction upon the question, in whom the high sovereignty of that country resides; it was sufficient, if there was that sort of *imperium in imperio*, which marked the national character of those who live under it: the sovereignty of the *British* nation was complete over those who resided there under their protection, to give it the supreme power of life and death: it was to

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Rachael Moba-
reck, Lords.
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to them that Mr. *Millar* came accredited, and not to the Mogul; as living amongst the *English*, and under their protection, he was necessarily subject to the same laws as *Englishmen* residing there: those laws forbid the trading between *British* subjects and the enemy. There was a case in the last war, which appears to be conclusive on the circumstances in this case; there the question turned on the property of a person living in the *Dutch* factory of *Cochin*, and it was contended that he was to be considered as a subject of the rajah of *Cochin*; but the judgment of the Lords of Appeal condemned his property, as the property of a person living in a *Dutch* factory, and therefore liable to be considered as a *Dutch* merchant.

JUDGMENT.

Sir W. Scott.—This is the case of a cargo seized in the harbour of *Cowes*, where the ship had put in for final orders, her professed original destination being *Hamburgh*. A claim is given for this cargo as the property of a Mr. *Millar*, described to be *American* consul at *Calcutta*. The proofs of property are not satisfactory, and therefore further proof must be demanded, if it be necessary, to determine the matter upon that ground. But the captors are willing to admit the sufficiency of the present proof, for the purpose of obtaining the judgment of the Court upon points of law, which they contend to be decisive against the claim, however supported in point of fact. On the part of the claimant many grounds have been taken: I am first reminded that he was *American* consul, although it is not distinctly avowed that his consular character

is

is expected to protect him; nor could it with any propriety or effect, it being a point fully established in these Courts, that the character of consul does not protect that of merchant united in the same person. It was so decided on solemn argument in the course of the last war, by the Lords, in the cases of Mr. *Gildermester*, the *Portuguese* consul in *Holland*, and of Mr. *Eykellenburg*, *Prussian* consul at *Flushing*. These cases were again brought forward to notice in the case of Mr. *Fenwick*, *American* consul at *Bourdeaux* in the beginning of this war; on whose behalf a distinction was set up in favour of *American* consuls, as being persons not usually appointed, as the consuls of other nations are, from among the resident merchants of the foreign country, but specially delegated from *America*, and sent to *Europe* on the particular mission, and continuing in *Europe* principally in a mere consular character. But in that case, as well as in the case of *Sylvanus Bourne*, *American* consul at *Amsterdam*, where the same distinction was attempted, it was held that if an *American* consul did engage in commerce, there was no more reason for giving his mercantile character the benefit of his official character, than existed in the case of any other consul. The moment he engaged in trade, the pretended ground of any such distinction ceased; the whole of that question therefore is as much shut up and concluded as any question of law can be.

Another topic has rather been insinuated, than expressly urged, that Mr. *Millar* was not a *general merchant* of *Calcutta*; but whether he was a general merchant, or not, is totally immaterial; for if this was even his first adventure, still in this transaction

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Pigou, Lords,
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transaction he must be taken as a merchant, and can be considered in no other character: a third ground is, that the trading was not direct to *Batavia*, but that the ship sailed first to *Tranquebar*, and from thence took a cargo to *Batavia*; with the proceeds of which cargo the present cargo was purchased and taken in on account of this gentleman; but the mere prior interposition of a neutral port will not alter the nature of the offence, which consists in this, that the cargo, on which the present question arises, was taken in at the enemy's port. If Mr. *Millar* is to be taken as a *British* merchant, the outward voyage will be immaterial, and the circumstance of purchasing the cargo in question at the enemy's port, will be sufficient to make it liable to the penalty of confiscation. Another ground is, that he was not resident in the *British* territory, for that the sovereign of this country is not in possession of *Bengal*, with the same imperial rights as belong to the *Mogul*. It is contended on this point that the King of *Great Britain* does not hold the *British* possessions in the *East Indies* in the right of sovereignty, and therefore that the character of *British* merchants does not necessarily attach on foreigners locally resident there. But taking it that such a paramount sovereignty, on the part of the *Mogul* princes, really and solidly exists, and that *Great Britain* cannot be deemed to possess a sovereign right there; still it is to be remembered, that wherever even a mere factory is founded in the eastern parts of the world, *European* persons trading under the shelter and protection of those establishments, are conceived to take their national character from that

that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries, and is different from what prevails ordinarily in *Europe* and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries: In the western parts of the world alien merchants mix in the society of the natives; access and intermixture are permitted; and they become incorporated to almost the full extent. But in the East; from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were---*Doris amara suam non intermiscait undam*; not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory, under whose protection they live and carry on their trade.

With respect to establishments in *Turkey*, it was declared in the case of Mr. *Fremeaux* (a) in the last war,

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(a) The attestation of Mr. *Fremeaux* stated, that he was born at *Smyrna*, and had ever resided there, with the exception of a short trip to *France*; that the ship and goods claimed by him were his sole property; that none of His Majesty's enemies had any share therein,

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war, that a merchant carrying on trade at *Smyrna*, under the protection of the *Dutch* consul at *Smyrna*, was to be considered as a *Dutchman*, and in that case the ship and goods belonging to Mr. *Fremeaux*, being taken after the order of reprisals against *Holland*, were condemned as *Dutch* property. The same in *China*, and I may say generally throughout the East, persons admitted into a factory, are not known in their own peculiar national character; and being not admitted to assume the character of the country, they are considered only in the character of that association or factory. The case alluded to, (in which Lord *William Murray* was concerned as agent claiming for Mr. *Cohen*), was this; a Jew living in a *Dutch* establishment under the sovereignty of the rajah of *Cochin*, on the coast of *Malabar*, claimed under the character of a subject of the rajah of *Old Cochin* (a), but he was held by the Lords of Appeal

to

therein, and that he had never been a member of any *Dutch* factory or company established at *Smyrna*, or in any other part of the *Ottoman* dominions. The ship was sailing from *Amsterdam* to *Smyrna*, under *Dutch* colours, with a *Dutch* pass, and documented as a *Dutch* ship. The printed papers of appeal contain a full and particular account of the nature of the *Dutch* establishment in *Smyrna*.—For which, see Appendix, No. 1.

(a) In the libel of appeal, the claimant, Mr. *Cohen*, was described as an inhabitant of *Cochin China*, and as a subject of the Emperor of *China*; and this is sometimes spoken of as a *Chinese* case: but the mistake was corrected in other parts of the proceedings: he was, in fact, a resident in *Koetsiem de Sima*, in the territories of the rajah of *Koetsiem*, or as it is called by the *English*, *Cochin*

to be a *Dutchman*; and I remember perfectly well in the later case of Mr. *Constant de Rubecque* it was the opinion of the Lords, that although he was a *Swiss* by birth, and no *Frenchman*, yet if he had continued to trade in the *French* factory in *China*, which he had fortunately quitted before the time of capture, he would have been liable to be considered as a *Frenchman*. I am, however, inclined to think that these considerations are unnecessary, because though the sovereignty of the *Mogul* is occasionally brought forward for purposes of policy, it hardly exists otherwise than as a phantom. It is not applied in any way for the actual regulation of our establishments. This country exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty, and if the high, or as I may almost say, this empyrean sovereignty of the *Mogul*, is sometimes brought down from the clouds, as it were, for purposes of policy, it by no means interferes with that actual authority, which this country, and the *East India Company*, a creature of this country, exercises there with full effect. The law of treason, I apprehend, would apply to *Europeans* living there in full force; it is nothing to say, that some particular parts of our civil code are not applicable to the religious or civil habits of the *Mahomedan* or *Hindoo* natives; and that they are on that account, allowed to remain under their own laws. I say this is no exception; for with

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Etrusco, Lorda,
Dec. 8, 1798.

Cochin on the coast of *Malabar*, and claimed as a subject of the rajah of *Koetsiem*.

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Treaty, 19th
Nov. 1794,
Art. 13.

8 Term. Rep.
p. 31.

respect to internal regulations, there is amongst ourselves in this country, a particular sect; the Jews, that in matters of legitimacy, and on other important subjects, are governed by their own particular regulations, and not by all the municipal laws of this country, some of which are totally inapplicable to them. It is, besides, observable, that our own acts of parliament and our public treaties have been by no means scrupulous in later times in describing the country in question as the territory of *Great Britain*. In the *American* treaty the particular expression occurs, "That the citizens of *America* shall be admitted and hospitably received in all the sea ports and harbours of the *British territories in India*." The late case in the Court of King's Bench, *Wilson v. Marryat*, arising upon the interpretation of that treaty (and in which it appears to have been the inclination of that Court to hold our possessions in *India* to come within the operation of the navigation acts), gave occasion to an act of parliament, in which the term *British territory* is borrowed from the treaty. There is likewise a general act of 37 Geo. III. c. 117, for the allowance of neutral traders in *India*, which expressly uses the same term; reciting that "Whereas it is expedient that the ships and vessels of countries and states in amity with His Majesty should be allowed to import goods and commodities into, and to export the same from, the *British territories in India*." It is besides an obvious question, to whom are the credentials of this gentleman as consul addressed? certainly to the *British government*--to the *East India Company*, and not to the *Mogul*. What is the

the condition of a foreign merchant residing there? From attention to the argument of a gentleman whose researches have been particularly turned to subjects connected with the East, I have made enquiry of a person of the greatest authority on such a subject, who is just returned from the highest judicial situation in that country; and the result is (as on general principles I should certainly have expected), that a foreign merchant resident there is just in the same situation with a *British* merchant, subject to the same obligations, bound by the same duties, and amenable to the same common authority of *British* tribunals.

It is said to be hard that Mr. *Millar* should incur the disabilities of a *British* subject at the same time that he receives no advantage from that character; but I cannot accede to that representation; because he is in the actual receipt of the benefit of protection for his person and commerce from *British* arms and *British* laws, under an existing *British* administration in the country. He may be subject to some limitations of commerce incident to such establishments, which would not occur in *Europe*; but he must take his situation with all its duties, and amongst these duties, the duty of not trading with the enemies of this country.

I am of opinion therefore, that he must be considered as a *British* merchant; and that his property, as the property of a *British* merchant, taken in trade with the enemy, is liable to con-

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INDIAN
CHIEF.

March 5th,
1800.
Dr. Laurence.

Sir Robt. Chambers,
late Chief
Justice of Bengal.

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demnation. I am under the necessity of pronouncing this determination, and of condemning these goods as droits and perquisites of Admiralty, being seized and taken in port.

If the party thinks that I have decided on a wrong principle of law, he may appeal, and take the benefit of another tribunal; or if he thinks that the principle of law operates on the particular facts of this case with undue rigour; as the property must be condemned as droits of Admiralty, he will have the additional benefit of an application to the Crown, which possesses the only power to determine, how far from any equitable policy or private indulgence, the rigour of the principle of law ought to be relaxed and mollified, upon the special circumstances of this case.

March 6th,
1800.

THE MINERVA, RICKSTOCK Master.

Warrant of
arrest granted
against the mas-
ter of a private
ship of war for
wearing false
colours.

THE Proctor of the Admiralty exhibited two affidavits of *Richard Carpenter* second master, and *Agnes Wood* midshipman of His Majesty's gun-brig *Sparkler*, and prayed a warrant to arrest the *Rickstock* master of the private ship of war the *Minerva*, to answer articles that should be exhibited against him on behalf of the King in his

his office of Admiralty for a contempt (*a*) in wearing illegal colours.

Warrant grant, as a warrant of course.

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MINERVA.

March 6th,
1800.

(*a*) Sir Leoline Jenkins advertises to this offence in one of his charges given at the Admiralty sessions, as an offence under *the laws of the sea and ancient constitutions of the Admiralty*. "The next thing I shall commend to you are some few things that are made enquirable by the laws of the sea and the ancient *constitutions* of the Admiralty. The first relates to the flag; you are to enquire, if any masters or commanders of merchantmen have presumed to wear His Majesty's jack, commonly called the union jack, or any other jack, in shape or mixture of colours approaching to it, so that it cannot be easily distinguished from the King's jack, or any other flags, jacks, or ensigns whatever, than those usually worn on merchant-ships, viz. the flag and jack white with a red cross, commonly called *St. George's cross*, passing quite through the same, and the ensign red, with a cross on a canton white within the upper corner thereof next to the staff." *Life of Sir L. Jenkins*, vol. 1. p. 97.—There is also a Proclamation to this effect in *Rymer*, A. D. 1634. Rym. Fœd. vol. 19. p. 549. We taking it into our royal consideration that it is meet for the honour of our own ships in our royal navy, and of such other ships as shall be employed in our immediate service, that the same be by their flags distinguished from the ships of any other of our subjects; do hereby straightly prohibit and forbid that none of our subjects of any of our nations and kingdoms shall from henceforth presume to carry the union-flag in the main-top or other parts of their ships, that is, *St. George's cross* and *St. Andrew's cross* joined together, upon pain of our high displeasure. But that the same union flag be still reserved as an ornament proper for our own ships, and ships in our immediate service; and likewise our further will and pleasure is, that all the other ships of our subjects of *England* carry the red cross, commonly called *St. George's cross*, as of old time has been used, and also that all the other ships of our subjects of *Scotland* shall from henceforth carry the white cross, commonly called *St. Andrew's cross*, whereby the several

March 13th,
1800.

THE AMERICA, SHERBORNE Master.

Freight refused
to a ship bound
from Mauritius
ostensibly to
Hamburgh, but
taken going
into a French
port.

THIS was an *American* ship bound from *Mauritius*, *ostensibly* to *Hamburgh*, but taken 6th April 1796, on the *French* coast between *Belliste* and the isle of *Gros*, going to a *French* port, under a pretence of want of water. The ship had been restored on farther proof 30th March 1797, reserving the question of freight and expences; the

shipping may be distinguished, and we thereby the better discern the number and the goodness of the same, whereby we will and straightly command all our subjects forthwith to be conformable and obedient to this order, as they will answer the contrary at their peril.

See also the Proclamation issued 1st Jan. 1801, declaring what ensigns or colours shall be borne at sea in merchant ships or vessels belonging to any of His Majesty's subjects of the United Kingdom, &c.

" And whereas according to *ancient usage* the ensigns, flags, jacks, and pendants worn by our ships, and appointed as a distinction for the same, ought not to be worn on board any ship or vessel belonging to any of our subjects, so that our ships and those of our subjects may be easily distinguished and known, &c. several ensigns are appointed for merchantmen and vessels having letters of marque, &c. vessels used by the commissioners of the navy, &c. all commanders and others are directed to seize any flag worn contrary to this declaration, and report the names of such ships or vessels, and their masters, to the Admiralty, &c. and we do hereby command and enjoin the Judge and Judges of our High Court of Admiralty for the time being, that they make strict inquiry concerning all such offenders, and cause them to be duly punished." *Gazette* of 3d Jan. 1801. For the particular directions, see Appendix, No. 2.

Cargo.

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cargo being now condemned on farther proof, application was made on the part of the claimant of the ship for an allowance of a freight; it was said, that he had been deceived by the master in regard to the destination; that it would be hard on him, meaning to engage his ship in a legal trade, to be subjected to a forfeiture of freight, merely on account of the fraudulent and self-interested deviation on the part of the master.

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AMERICA.

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Court.--It is not a new rule, that if a ship is going with false papers the owner shall lose his freight: I do not say that if an owner makes out a clear case that he had been duped by the fraud of the master, the Court would in all cases press the rule to the utmost rigour against him; I will not say that a case may not be supposed, in which the Court would incline to exonerate the owner, in spite of the general rule, that the act of the master shall bind his owner; and in spite of all those considerations of utility and necessity by which this rule is sustained: but I cannot take it upon a vague reasoning like this, that it *might* be so, or it *might* be thus; I cannot take conjecture as a ground of such a judgment. The fact is, that the ship is found in such a situation with a false destination, and, as I think, with *French* property on board; I shall therefore pronounce, that the owner is not entitled to his freight.

March 17th,
1800.

Property of an
English mer-
chant, resident
in Holland,
condemned.

THE CITTO, FEHNDRICK Master.

THIS was a case of a *Danish* ship taken on a voyage from a *Spanish* port to *Guernsey*, April 1796. The ship had been restored with freight, and the cause now came before the court on a claim given for some part of the cargo on behalf of the house of trade of *Collins and Bowden of Guernsey*. Farther proof had been directed to be made of the national character of Mr. *Bowden*, said to have been a domiciled merchant of *Rotterdam*, the shares of the other partners had been restored 24th July 1799.

On the part of Mr. *Bowden* it had been stated at the former hearing, that he had been settled in *Holland*, but had left that country in 1795, and settled in *Guernsey*; that the date of this transaction was in April 1796, and the nature of it no way connected with the *Dutch* trade; that it was not till after the date of this transaction, that Mr. *Bowden* went again to *Holland*, not to settle there, but for the purpose of making up his accounts in that country; that he had since occasionally resided in *Holland*, where *British* merchants may reside without forfeiting that denomination and character; as appears by His Majesty's order of council, 3d September 1796, which directs the landing of goods imported under that order, to the *United Provinces*, to be certified by *British* merchants resident there. It was farther said, that he had since the month of June 1796 resided partly at *Rotterdam*, and partly in *East Friesland* in *Prussia*; and that it did not appear that he was at the time

of

of the hearing the cause in *Holland*, or that he might not again have returned to *Guernsey*.

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Cirro..

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The Court.--It does not appear what has been the nature of Mr. *Bowden's* residence in *Holland*; whether he has confined himself to the object of withdrawing his property, or whether he may not have been engaged in the general traffic of the place; the Court must, therefore, see more of the nature of his residence there. If he has confined himself to the purpose of withdrawing his property, he may be entitled to restitution; more especially adverting to the order of council, which is certainly so worded as not to be very easy to be applied.

On this day, 17th *March* 1800, an affidavit of Mr. *Bowden*, made 6th *August* 1799, was produced, stating, "That he resided in *Rotterdam* six years previous to the invasion of the *French* in the month of *January* 1795, having carried on trade in partnership with *W. Collins*, a native of *Guernsey*; that on the approach of the *French*, he quitted *Holland*, and landed in *England* 20th *Jan.* 1795, and proceeded to *Guernsey*, and resided there with his family; that in the month of *June* 1796, he was under the absolute necessity of returning to *Holland* for the purpose of recovering debts due, and effects belonging to the partnership; his partner, *W. Collins*, remaining in *Guernsey*; that in respect to his political sentiments, he had always entertained a most rooted aversion to the subversive principles of republicanism, and was at all times a most loyal subject of his *Britannick* Majesty's government; in support of which assertion the affidavit was subscribed by several persons, stiling

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themselves *British merchants residing in Rotterdam*. The affidavit further set forth, that Mr. *Bowden* had never taken any oath to any other than the *British government*, not even the customary oath required for the purpose of obtaining the rights of a burgher or citizen of *Rotterdam*, for the carrying on of commercial concerns, which is done by every *Briton* in *Holland* without prejudice to his birth-right; that during his return to *Holland*, he had contributed for the raising of seamen at *Guernsey*, and had joined in all loyal subscriptions, &c.; that at the present time he was still under the necessity of remaining in *Holland* for the purpose of recovering part of the said debts and effects, in order to honor his engagements; and that were he to leave *Holland* at this time, it would not be possible for him to recover the said debts and effects; but that it was his intention to return to his native country as soon as his affairs would permit, where his mother and all his relations reside.

Court.—It appears from this affidavit that Mr. *Bowden* is in *Holland* at this time.

Lawrence.—I apprehend there have been cases in which persons in such a situation have, nevertheless, received restitution.

Court.—There have been cases under the *Grenada act*, and similar acts, for the protection of certain persons resident in the enemy's country, allowing them to export to this country, and entitling them as to such exportation, to be considered as *British subjects*. But they were special cases.

cases under particular acts of parliament. It would be a strange act of injustice, if whilst we are condemning the goods of persons of all nations resident in *Holland*, we were to restore the goods of native British subjects resident there. An Englishman residing and trading in *Holland* is just as much a *Dutch* merchant as a *Swede* or a *Dane* would be.

Condemned.

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THE PORTLAND, FARRIE Master, and nine other ships.

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This was a question, depending in various claims,
on the national character of Mr. Ostermeyer.

JUDGEMENT.

Sir W. Scott.—This case, is one of ten, in which claims have been given for Mr. Jacob Ostermeyer, described as domiciliated at Blankenese, and as having a house of trade at *Altona*; of one of the claims of Mr. Ostermeyer, for part of the cargo in the *Floreat Commercium*, I have already disposed, being of opinion that, as it was totally destitute of proof of property, the party could not be let in at this late period to supply that total defect of proof that was observable in that case. There remain nine other, four of which, the *Portland* (a), *Spazhamheid*, *Young Ferdinand*, and the *Hoop*, do not appear to have any connection with *Ostend*; with respect to the *Portland*, I find it determined by

National character of a person removed from the enemy's country.—Distinction as to his trade still connected with that country, and other neutral trade, &c.

(a) *Portland*, an American ship, taken 20th Dec. 1795. Restored. Voyage from *Hamburg* to *London*. Claim of Mr. Ostermeyer for a considerable part of the cargo.

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my predecessor, in one instance, that the claim of Mr. Marsh, a British subject, should be restored; by which the Court must virtually have declared, that the destination was not to *Ostend*, but in truth to *Hamburg*; because if the destination had been to *Ostend*, the property of a British merchant embarked in that trade must have been condemned. It appeared that the ship was to touch at *Ostend*, to deliver some prisoners there on the part of this government; but there is no reason to doubt of the ulterior destination to *Hamburg*; and there can be no question of the propriety of the former judgment; on which indeed if I could entertain a private doubt, I should not take upon myself to shake the declaration of my predecessor.

The *Spazamheid* (a) was bound from *London* to *Emden*; and although it does appear that some of the goods were to find their way to *Ostend*, it is sworn, "That the destination was to *Emden*," and there is no reason to think that there was in this destination any view towards *Ostend*. The *Jonge Ferdinand* (b) was going from *Spain* to *Hamburg*, and the *Hoop* (c) from *Amsterdam* to *Bourdeaux*. In these no ground of suspicion whatever arises, points to *Ostend*; I shall therefore consider these four cases as having nothing to do with that place.

(a) Taken 18th Dec. 1795. Claim of Mr. Ostermeyer for some parcels of tobacco, a part of the cargo.

(b) The *Jonge Ferdinand*, claim of Mr. Ostermeyer for some parts of the cargo.

(c) *Hoop, Witzes*, a *Prussian* ship taken Jan. 6th, 1798, voyage from *Amsterdam* to *Bourdeaux*; claim of Mr. Ostermeyer for some parts of the cargo.

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The character in which Mr. *Ostermeyer* claims, as arising out of his general history, makes this circumstance of a destination to *Ostend* of great importance. Mr. *Ostermeyer* says, (a) "that he had been domiciled at *Ostend*, as a partner of a house of great trade; but that on the irruption of the *French* into that country he removed himself; that he quitted *Ostend*, and has since had no connection or interference with that partnership." On the other side it is contended that this is not a *bona fide* renunciation, that his name still continues a prominent name in the firm of that house, and therefore that he is liable to be considered as a merchant of *Ostend*. It is contended besides, that if he is not a partner in that house, still he is to be considered a trader of *Ostend*, as a sole trader; that his connection with that place still continuing, he is to be considered as a merchant of *Ostend*, and as such liable to have his property condemned. Now, as

(a) Mr. *Ostermeyer's* affidavit stated, "That he was a native of *Germany*, and formerly resided and carried on business at *Ostend*, in partnership with *J. De Coninck*, under the firm of *Ostermeyer* and *De Coninck*; that on or about the 25th of *June 1794*, in consequence of the *French* troops having got possession of *Ostend*, and the deponent not choosing to become a subject of the government and law thereupon established, such partnership was dissolved, and the deponent retired, and altogether withdrew himself and family from *Ostend*, and came to reside at *Blankenese*; where he has ever since been domiciled and resident, having also had a house of trade, or counting-house, at *Hamburgh*; that subsequent to the dissolution of the partnership, 25th *June 1794*, he has never had any connexion or concern in business whatever with the said *J. De Coninck*, but has constantly traded and carried on business on his own sole and absolute account and risk, as a merchant fixed and settled at *Blankenese*, and having a house of trade at *Hamburgh*."

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other cases,
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to the circumstance of his being engaged in trading with *Ostend*, either under a partnership, or as a sole trader, I think it will be difficult to extend the consequences of that act, whatever they may be, to the trade which he was carrying on at *Hamburg* and having no connection with *Ostend*; because, call it what you please, *a colourable character*, as to the trade carried on at *Ostend*, I cannot think that it will give such a colour to his other commerce, as to make that liable for the frauds of his *Ostend* trade.

In the case of Mr. *Sontag* it appeared that he had emigrated from *Holland*, and had settled at *Altona*, but still continued to carry on *the trade of Holland*. If he had been engaged in other trade totally distinguishable from the trade of *Holland*, I do not see how that would have affected him. In the present case, as far as the person is concerned, there is a neutral residence; as far as the commerce is concerned, the nature of the transaction, and the destination, are perfectly neutral; unless it can be said that trading in an enemy's commerce, makes the man, as to all his concerns, an enemy; or that being engaged in a house of trade in the enemy's country, would give a general character to all his transactions; I do not see how the consequences of Mr. *Ostermeyer's* trading to *Ostend* can affect his commerce in other parts of the world. I know of no case, nor of any principle, that could support such a position as this, that a man, having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in

in those which belonged to his belligerent dominieit. The only light in which it could affect him would be, as furnishing a suggestion that the partners in the house at *Ostend* were also partners at *Altona*. But on this part of the case, I think the evidence of the merchants at *Hamburgh*, certifying that they have inspected his books at *Altona*, and find no trace of a connection with *Ostend*, is good evidence; because, although it is but slight proof to destroy entirely a suspicion of a connection with *Ostend*, yet it is of great importance as to the trade carried on at *Altona*; they swear, "that there is nothing appearing in his books which points in any way to a connection with any partnership at *Ostend*."

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It comes then to this question, Whether Mr. *Ostermeyer* having connection at *Ostend*, either as a partner in a house of trade, or as a sole trader, would be liable to be considered as an *Ostend* merchant, in respect to a transaction originating with another house, and having no connection with *Ostend*? I am of opinion that the consequences of the transaction must be limited to the transaction at *Ostend*, and that his other trade must be exonerated; I think, therefore, with respect to these four ships, without going into the particular evidence, that they are cases of restitution; at the same time I think I am under the necessity of saying, that the captors have done nothing more than what the situation of Mr. *Ostermeyer* compelled them to do, in bringing these cases to adjudication; and therefore I pronounce them to be entitled to their expences--desiring at the same time to be understood, as not laying down any

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any general rule from this precedent. Considering the circumstances of the several cases, that the *Portland* was going on her primary destination to *Ostend*, and that in the *Spazamheid* there were goods clearly designed for *Ostend*, I think it is but reasonable that the captors' expences should be paid.

With respect to the remaining cases (2), I shall now proceed to inquire into the nature and character of Mr. *Ostermeyer's* connection with *Ostend*. On the part of Mr. *Ostermeyer* it is contended, and strongly pressed, that he had entirely removed himself, and retired from the partnership; but, on the other side, it is a little singular, that if he had actually retired, his name should still continue the first in that firm. Mr. *Ostermeyer* says, "that not choosing to live under the *French* dominion, he retired from the house; but that his name was kept in by agreement with the other partners." If he was a sufferer from his political opinions, and an emigrant, it seems not the most desirable thing that his name should have been publicly continued: it is, besides, an extraordinary thing that no information, either public or private, should have been given of this dissolution. His agent here, Mr. *De la Cour*, says he did not receive any information of it till *March 1798*. It is said that Mr. *Ostermeyer* was in doubt where he should settle;

(a) *Juffrouw Alida*; claim of Mr. *Ostermeyer* for some part of cargo.

Jong Isabella, Vogelins, from *Ostend* to *Brest*, taken 8th Feb. 1798; claim of Mr. *Ostermeyer* for ship and cargo.

Jonge Emilia, Langhely, taken 12th July 1797, voyage from *Dunkirk* to *Bourdeaux*; claim of Mr. *Ostermeyer* for the ship.

Frau Louisa, from *Ostend* to *Bilboa*, taken 27th Sept. 1796; claim of Mr. *Ostermeyer* for the ship.

and

and was travelling about, not knowing where to rest his foot; but he had taken, or asserts that he had taken, the other step, which it was to be expected he would announce to his correspondents, the step of retiring from the partnership; and yet no communication, either public or private, is given of the change, till many months after it had taken place. I cannot help thinking that a total silence on this point, connected with the circumstance of his name continuing in the firm, wears a very suspicious appearance. There is, besides, an affirmative circumstance appearing in one of these cases, the *Frau Louisa*, which, connected with this silence, still further confirms the suspicion. There is a letter written in the names of *Ostermeyer* and *De Coninck*, by which that house appears to have been exercising a perfect controul over the vessel, and giving directions respecting her to the correspondent in *Spain*; although it is not pretended that the vessel was chartered to them, and indeed the very contrary appears on the face of the papers. This is a strong affirmative circumstance; and although it was pointed out at the first hearing, no explanation has been given of it at this late hour, which does furnish a suspicion that Mr. *Ostermeyer's* interest and connection with his former house at *Ostend*, were not so completely untwisted as they are represented to have been.

Another suspicion arises from the nature of the instrument, (a) which has been produced. It is not, indeed,

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(a) Contract for the dissolution of partnership, stating, "That the community of trade and commerce carried on under the firm of *Ostermeyer* and *De Coninck* doth, from the day of the date of these

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indeed, quite such as it has been represented on the part of the captors, as giving up all the interest to Mr. *De Coninck*, and as reserving nothing to Mr. *Ostermeyer*. Had it been so, nothing more would have been required to satisfy me that it was not a *bond fide* case; because, where there had been a *communio bonorum*, that all should terminate one way, would be unnatural and incredible. But I do not think that is a correct description of it. It states, "that he has taken to himself his share." I am aware of the particular situation of affairs round them, and can believe that on sudden peril there might be a necessity of huddling up the accounts in the best manner they were able; and that a man eager to provide for his personal safety, might be content to take what, on a hasty survey, appeared to belong to him. Nevertheless I cannot but think that there would be something reserved for subsequent consideration; and that on a more

these presents, cease. That the first appearer, *J. Ostermeyer*, *hath taken to himself his share* and common property, so and in such manner, that he doth hereby declare to be fully satisfied with the same, provided that the remaining goods, merchandizes, effects, actions, and credits, none excepted, concerning the partnership, are, with exception of all other property, to belong to the said Mr. *De Coninck* alone:—That he the said *De Coninck* shall henceforward have to liquidate with all the debtors and creditors, all open standing transactions to his benefit or charge; and though the first appearer in the aforesaid partnership has, from this day, no more goods in common, he nevertheless will permit the second appearer, Mr. *De Coninck*, to continue his business under the former firm of *Ostermeyer and De Coninck*, but that the said first appearer is not to be answerable for the same.

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deliberate

deliberate review, a more equitable partition would take place. It is, I think, impossible, that the mixed concerns of a great house could be, in this manner, at once and in a moment distributed between the partners; that this could have been the *aeternum vale* between them, and that there should not have been some subsequent communication, for the final settlement of their accounts; I cannot say that I am satisfied that the partnership is entirely dissolved; it is possible that more satisfactory information may be given. The letter in the *Frau Louisa* may be explained; in the two other cases the letters of orders may be produced.

But the partnership is not the only point in these cases, on which Mr. Ostermeyer's connection with Ostend has been argued. It is said, that he has appeared as a sole trader in the commerce of Ostend; and it is certainly very observable, that Mr. Ostermeyer's trade has not been conducted with all the prudent timidity and jealousy, which we should expect from him. I do not say, that Mr. Ostermeyer might not trade to Ostend from his new residence, as any other person might; but I think it is a circumstance open to just remark, that the tide of his commerce should have set so much that way, to the very place from which he had emigrated in apprehension and disgust: and I think it does raise a strong suspicion, that he had yet an interest there, and that he had still a root left behind. There is besides another circumstance before the Court, which is not sufficiently explained. It has happened that many Ostend fishing-boats have been brought before the Court, documented in his name, and for which no claim has been given. It

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is said, that he does not appear to have been privy to those transactions, and that he has not claimed them: but the documents in those cases appear just as full and as regular in every respect, as they do in the other cases in which he has claimed; and I cannot take it, that he has been the victim of an imposition, in this extraordinary manner, merely because he has not claimed. I can see good reason why he might not think it prudent to claim; and why he might choose to sacrifice these smaller interests to preserve others of more value. The circumstance of the fishing-vessels, connected with his other course of trade at *Ostend*, very much shakes the credit of that paper, which describes him as a person proscribed at *Ostend*. I cannot say what the regulations of *France* may have been; I know how little they have been constructed on any uniform principle; but it is with difficulty to be conceived, that a person who had quitted the country as a banished man, would be permitted to carry on trade there, in the public manner in which he appears to have done: I cannot dispose of this material fact, on a mere absence of claim, nor on the mere suggestion of counsel. I shall require Mr. *Ostermeyer* to deny distinctly on oath his property in these fishing-vessels; and also to certify that he is not established as a sole trader at *Ostend* --- I therefore order still further proof.

On a subsequent day, 20th Nov. 1800, a farther affidavit was produced, with several exhibits (a) referred

(a) Affidavit of *Johan Jacob Ostermeyer* of *Blankenese*, [16th May, 1800.] stating, "That he has not had any establishment whatever

referred to in it; after which the Court decreed the *Frau Louisa* and the *Jonge Isabella* to be restored.

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11th

whatever at *Ostend*, since the time of his departure from *Ostend*, nor has at this present time; that he carried on his trade from and to *Ostend*, solely in the character of a neutral merchant established at *Blankenese*, and having his counting-house at *Hamburg*, but never in the character of a merchant of *Ostend*; that since his separation from the partnership with the house of trade of *Ostermeyer* and *De Coninck* at *Ostend*, he has not had any interest or partnership whatever with the said house of trade; that he has not any knowledge, notice, or interest whatever, of, or in the letter found on board the ship *Dame Louisa*, signed *Ostermeyer* and *De Coninck*; that his fear and hatred of the new *French* government and their principles was so great, that he left *Ostend* in haste, and without making use of any of the forms adopted in peaceable times, and gave up his said partnership; that he would not have given up his establishment at *Ostend*, if that place had remained under the *Austrian* government; that he the deponent has no share whatever in any house of trade at *Ostend*, but only corresponded with different houses of trade at that place as neutral merchants, residing in neutral places, are accustomed to do, and not otherwise, &c.

The said appearer lastly affirmed, that he purchased several fishing-vessels actually for his own account, but having in the course of a few years found that he derived no benefit therefrom, he gave orders to Mr. *Louis Kestman*, at *Ostend*, to sell the said vessels at any price, to discharge the masters, and deliver the ships, documents to the *Danish* consul, as appears by the copy of the letter hereto annexed; that is to say, the following ships at the following prices, to wit,

<i>Die Kleine Johanna</i>	for	3000	guilders
<i>Balthaser</i>	for	3200	ditto
<i>Stadt Flensburg</i>	for	2950	ditto
<i>Der Grosse Stier</i>	for	3500	ditto
<i>Der Winter</i>	for	2900	ditto
<i>Minerva</i>	for	3300	ditto

The
PORTLAND.

March 27th,
1800.

Merchant ship
employed in
French trade,
&c.

11th December 1800, the *Jonge Emilia* was condemned, on the ground that she appeared to have been altogether left in the hands of French merchants, and employed for seven voyages successively in the trade of France, &c.

April 8th,
1800.

THE SANTA BRIGADA, PILLOW Master.

Allegation of
joint capture on
behalf of a pri-
vate ship of war
to share with
King's ships, on
suggestion of
being in sight,
rejected.

THIS was a case of an allegation of joint capture on the part of a private ship of war, asserted to have been in sight at the time of the capture of this valuable Spanish galleon by the *Triton* frigate, and to have put herself in motion in such a manner as *might have* been effectual, in cutting off the retreat of the galleon into a Spanish port.

In opposition to the allegation, the King's Advocate.--The capture of this valuable ship was made so long ago as the 17th of October 1799, off the Spanish coast, and yet no allegation is offered on the part of these asserted joint captors till the month of Feb. 1800; from which it may be inferred, that the parties were not at the time impressed, with any notion of the service they had contributed, nor with any sanguine hope of deriving benefit from it. The two first articles state the

That instead of delivering the papers, the same were secretly, and without his knowledge and consent, retained on board the vessels at Ostend, and the vessels allowed to navigate with them, wherefore he the deponent, when he was advised thereof, did not trouble himself about them, but having long ago sold the same, left them to their fate."

relative

relative force of the several vessels, and describe the private ship of war to have mounted 14 guns, the *Spanish* frigate 36, and the capturing *British* frigates to have been of much superior force; there is nothing in this statement that leads to any inference of intimidation; co-operation is not pretended; the practice of this Court does not afford any instance of a private ship of war sharing with a King's ship, from the mere circumstance of *being in sight*; there must be actual service: the act relied on in this allegation is stated in the 5th article: "That on the evening of the 16th she plainly saw and discovered the *Spanish* frigate, and chased so as to keep in sight the whole night; on the morning she heard a firing, and about six o'clock perceived the engagement, and immediately sailed towards the *Spanish* coast among the rocks and lands, for the purpose of intercepting the escape of the *Spanish* frigate, and preventing her from getting into *Vigo*." But even this is mere intention only, for before she could take her station she was herself driven off, and chased by four small *Spanish* vessels that came out from the *Spanish* coast.

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SANTA BA-
GADA.

April 8th,
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In support of the allegation, it was said--That no inference arose from the delay, as the privateer continued out on her cruize, and did immediately, on coming home, send instructions to prosecute this claim. That no objection could be drawn from the disparity of force, if it should appear that exertions had actually been used, as there was a case in the recollection of the Court, the *Consejo* (*a*), in which ^{(e) Infra, p. 53.} a very small ship fought one considerably larger,

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and so molested her, as to have contributed very materially to the capture: Although there might be no case, in which *a mere being in sight* had been held to entitle a private ship of war to share with a King's ship; the want of such a precedent would not affect the present claim---this was not such a case; by the very act of putting herself in motion to intercept the *Spanish* ship, this vessel had incurred the danger of being chased by four other *Spanish* vessels; and by that very circumstance had operated as the means of leading them off from the object they had in view, the purpose of looking out for the *Spanish* frigate, and of employing themselves for her protection.

JUDGMENT.

Sir W. Scott.—This is asserted to be a case of merit on the part of a private ship of war; and if so, it must certainly be considered as a case of diffident and modest merit, inasmuch as the parties have not thought proper to come forward and assert their pretensions till a very considerable time after the capture. I cannot help thinking that if they had felt much confidence in their case, they would have thought it as good a cruise, to pursue this prize into the Court of Admiralty, as to have continued out on the cruise they were then engaged in—however the matter is now brought before the Court. The disparity of force that has been observed upon, is certainly not conclusive; as we all remember instances of great merit in vessels of small force, especially that which has been mentioned, in the case of the *Buen Consejo*

Consejo (a), in which the annoyance given by a very small ship, was the principal cause of the ultimate capture. But those are cases of a very different description from the present: The *being in sight only* will not be sufficient; it would open a door to very frequent and practicable frauds, if, by the mere act of hanging on upon His Majesty's ships, to pick up the crumbs of the captures, small privateers should be held to entitle themselves to an interest in the prize, which the King's ships took. The sound doctrine of the Court has been, that *the being in sight*, with respect to these two descriptions of vessels, is not sufficient to entitle the privateer to share. It is said, however, that there was an actual assistance; the 5th article states, "that she made an attempt to get between the prize in question and the land, and would have pursued it, but that she herself became the object of chace, to four other vessels that came out from the coast." Instead of the pursuer she became the object of pursuit. It is the first instance, I believe, in which the character of a captor has been claimed by a flying vessel. *Lepus tute es et pulpamentum queris.* It is argued, however, that she was

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(a) This was a Spanish register ship of 800 tons and 26 guns, Adm. June 26,
12-pounders, taken 20th Nov. 1779, by the *Hussar*, Capt. *Salter*. 1782.
A claim of joint capture was given and allowed on the part of the Lords. March
Resolution privateer of 16 6-pounders, Capt. *Sladen*, whose gallantry and perseverance appeared highly meritorious, in keeping the prize in chace from the 5th Nov. till the 20th; having fought her several times, notwithstanding the disparity of force, and in having kept constantly up with her, burning false lights, &c. during the night, to attract the notice and assistance of some British cruiser. 23, 1786.

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eventually of service, by diverting the attention of the four *Spanish* frigates from the transaction of this valuable capture ; and it is not improbable. But mere diversion of attention has never been held a sufficient ground for a title of joint capture ; it is a mere casualty, totally unconnected with all merit, actual or constructive. If she herself had been captured, it would have produced exactly the same effect in a still stronger degree ; and yet it would have been perfectly ludicrous, to have pronounced for her joint interest of capture, under such circumstances. On the whole I am of opinion, that the articles of this allegation do not assert such a claim, as can in law establish the parties to share as joint captors, if they are proved ; and therefore I shall reject it.

July 4th,
1800.

In the same case.

Head-money given on capture of a commissioned ship of war, notwithstanding there was a cargo on board. Refused on capture of a private ship of war, under similar circumstances.

A QUESTION was brought before the Court respecting head-money, in the case of a commissioned ship of war having a cargo on board.

Court.--What is the particular character of this vessel ; the *Spanish* word *fregata*, is not unfrequently applied to other ships, and does not necessarily imply a ship of war : What was the commission of the captain ? Is there any thing to shew that she composed a part of the *Spanish* navy ?

The King's Advocate stated--That she was a frigate of 36 guns, that there was no commission on board, that the ship was described as a ship of war, and

and the captain described himself to be "appointed by the minister of the marine."

Court.--I think that is sufficient to shew that it was a naval military appointment; whatever the decisions of this Court may have been in regard to private ships of war, it does not apply to this case. I shall pronounce for head-money in the usual form.

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The Registrar produced the Court Book of 1762, Adm. 1762, by which it appeared that in the case of the *Hermione*, under similar circumstances, the Court decreed head-money, expressly reciting "that it was a ship of war belonging to the king of Spain, and taken in fight."

Court.--I am disposed to decree head-money in cases of capture of public ships of war, as a matter of course, although they may have cargoes on board.

In the *Thetis*, a ship of the same description, taken at the same time--Decree the same.

In the case of the *Hirondella*, being a French letter of marque ship, with a cargo on board, taken at the same time.--N. B. This was not a part of the preceding capture, but a French ship from the *Isle of France* to *Bourdeaux*.

Court.--It is fit that the Navy Board should be informed of the circumstances, that they may take what measures they think proper: But the Registrar has reported on a former occasion (the *Francha*, 1st. Adm. Rep. p. 157.) that it has been the uniform practice of this Court not to pronounce for head-

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head-money where there is a cargo on board the captured vessel, though being a letter of marque. Were I to decide merely upon my own opinion, I should not be able to find sufficient reason for the distinction; nor do I perceive that it is suggested by the act of parliament. But as the distinction has obtained in practice, I shall not innovate against established precedents—If the practice is wrong, it must be corrected by the superior Court. In this case I shall pronounce against the demand of head-money.

April 29th,
1800.

THE CAREL AND MAGDALENA, BRANDT Master.

Jurisdiction of
Vice Admiralty
Courts confined
to ships brought
within the ports
of the respective
island, previous
to the act 41
Geo. 3. c. 99.

THIS was a case respecting the power of the Vice Admiralty Prize Courts to proceed to the adjudication of vessels not brought within their districts. It was a case of a *Danish* vessel taken at the capture of *Demerara*. The ship remained there, whilst the papers were sent to the island of *Martinique*, and proceedings were commenced in the Vice Admiralty Court of that island; where the ship, with two others under similar circumstances, were condemned on the 20th September 1797: A claim was given in the High Court of Admiralty for the ship, &c. on the part of a *Danish* merchant, and a monition was taken out against the captors to proceed to adjudication. The King's Proctor appeared for the captors under protest, and being assigned to extend his protest, the cause came before the Court on the following act on petition.

Heseltine,

Heseltine, under his protest, alleged the said ship to have been taken possession of by His Majesty's sea and land forces at the island of *Demerara*, and to have been afterwards proceeded against and condemned as good and lawful prize in the Vice Admiralty Court of the Island of *Martinique*; and prayed the Judge would be pleased to dismiss the captors from the monition served and returned in this cause. *Townley* dissenting, and alleging on the part of the claimants, that such condemnation, if any such was pronounced, was illegal, inasmuch as the said ship was not carried to *Martinique*, and prayed the Judge to over-rule the protest, and to assign the captor to appear absolutely.

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MAGDALENA.

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1800.

Court.—It can never be maintained that the sentence of the Court of *Martinique*, upon a prize not brought within the sphere of its jurisdiction, is a valid sentence. It is a known distinction between the Courts of Vice Admiralty and the High Court of Admiralty, that the former have only a local jurisdiction, confined to the adjudication of property brought within their own limits (*a*), whilst the authority of the High Court of Admiralty, in prize matters, extends over the whole of His Majesty's dominions, and operates in every port belonging to them.

Protest over-ruled.

Heseltine appeared absolutely and prayed a monition to transmit the ship's papers, &c.

Decreed.

(*a*) This applies to the extent of the late jurisdiction of the Vice Admiralty Courts. By 41 Geo. 3. c. 99. this jurisdiction has been put on a new footing. *Vide Appendix.*

May 6th,
1800.

THE ST. ANNE, ----- Master.

Claim of an
admiral of the
station, to share
in prize made
within his
district, during
his absence,
supported.

THIS was a case on petition, respecting the right of Admiral *Murray* to share in a capture made by His Majesty's ship *La Raison*, on the *Halifax* station. The question was, whether having been Admiral of that station, when the capturing ship was dispatched to cruize, but having returned home before the prize was taken, and having in fact, never returned to resume his command, Admiral *Murray* was to be deemed entitled to share, as Admiral of the station, under the proclamation.

On the part of the representatives of Admiral Murray, the King's Advocate stated in his opening the particular circumstances of the case, under which it was contended, that Admiral *Murray* was to be considered as Admiral of the station, and consequently, entitled to share in this capture.--- As it is of the utmost importance that all questions of interest between different persons in His Majesty's service should be most accurately understood, I shall state these particulars in the very words of the affidavit (a), and the exhibits annexed, to prevent as much as possible all danger of misapplication.

It

24th February 1800.

(a) Appeared personally *Alexander Urquhart*, of Parliament-Street, in the county of Middlesex, esquire, and made oath, "that he was secretary to the honourable *George Murray*, now deceased, late

It was contended in argument, by the *King's Advocate*, that Admiral *Murray* was at the time of the capture

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1808.

late vice-admiral of the white squadron of His Majesty's fleet, and commander in chief of His Majesty's ships and vessels employed and to be employed in the river *St. Lawrence*, and on the coast of *Nova Scotia*, commonly called the *Halifax* station, from the time of his appointment thereto in the month of *March* 1794, until on or about the 31st of *October* 1796; and then was employed until the 7th of *November* following in assisting Mr. *James Broadwell*, who then became secretary to the said vice-admiral and commander in chief, and continued so until the 2d of *January* 1797, when he struck his flag; that he well remembers, that on or about the 5th day of the said month of *November* 1796, orders in writing were issued by the said vice-admiral *Murray* as commander in chief as aforesaid; to *Francis Pender* esquire, captain of His Majesty's ship the *Resolution*, to take His Majesty's frigate the *Raison*, commanded by *John P. Beresford* esquire, under his command, and to sail from *Halifax* on a cruize on that station; and the said *John P. Beresford* esquire did at the same time receive orders from the said vice-admiral and commander in chief, to put himself under the command of the said *Francis Pender* esquire, and follow his orders and directions for his farther proceedings; and the said *Francis Pender* esquire did immediately give orders to the said *John P. Beresford* esquire, in pursuance of the aforesaid orders of the vice-admiral and commander in chief to put himself under his, captain *Pender's*, command, and follow and obey all such orders and directions as he should receive from him by signal or otherwise for His Majesty's service; that both the said ships, the *Resolution* and *Raison*, in obedience to the afore-mentioned orders, sailed together from *Halifax* on the 7th *November* 1796 on the said cruize; and this deponent hath been informed, and verily believes, that on or about the 2d day of *December* following, the said *John P. Beresford* in and with His Majesty's said frigate, whilst so cruizing under and in virtue of the aforesaid orders, met with and captured the said ship *St. Anne* with her cargo, which, in the month of *February* following

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1800.

capture Admiral of the station: That the interest of prize, which was given to such persons by the 3d and

following, were adjudged and condemned as lawful prize to His Majesty, taken by His Majesty's said frigate *La Raison*, the said *John P. Beresford* esquire; and he further made oath, that on or about the 22d day of *October* 1796, the said vice-admiral *Murray* was seized with a paralytic stroke, and although he was not thereby rendered unable to continue in the discharge of his aforesaid trust, or to perform the duties thereof, yet he chose to avail himself of the latitude and indulgence which his original instructions from the right honourable the Lords Commissioners for executing the office of Lord High Admiral of *Great Britain* afforded him, and set sail for *England* in the month of *November* following, on board His Majesty's frigate of war *Cleopatra*; and previous to his departure, to wit, on or about the 9th day of the said month of *November* 1796, he delivered his aforesaid instructions from the Lords Commissioners of the Admiralty, and also additional orders and instructions from himself as vice-admiral and commander in chief as aforesaid, dated at *Halifax* the first of the said month, to *Henry Mowatt* esquire, commander of His Majesty's ship of war *Assistance*, at such time the senior officer on that station; by which said additional orders and instructions the said captain *Mowatt* was confined to a particular plan and disposition of the squadron of His Majesty's ships and vessels employed on the aforesaid station; and which said plan and disposition was to remain in full force and effect as was therein expressly declared, during the time of his the said vice-admiral and commander in chief's absence, or until the arrival of another commander in chief on the said station; and which as this deponent hath been informed and believes, the Lords Commissioners of the Admiralty on their being made acquainted therewith approved; and this deponent hath also been informed and believes that the said captain *Mowatt*, in his letter to the Lords Commissioners of the Admiralty, bearing date the said 9th day of *November* 1796, acquainted their Lordships of his having received the aforesaid additional orders and instructions from the said vice-admiral and commander in chief, and of his intention not to make any alteration in them, unless

and 8th articles of the proclamation, was founded on a supposition, that they were responsible for the conduct

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unless circumstances should render it unavoidable, until he should receive their Lordships' further instructions ; and he further made oath, that although the said captain *Mowatt* did, as this deponent hath been informed and believes, by orders in writing under his hand, bearing date the said 9th day of *November* 1796, require and direct the said *John P. Beresford* esquire to consider himself under his command, and to obey all such orders and instructions as he should receive from him ; yet this deponent hath also been informed and believes, that the said captain *Beresford* did not receive such orders until after the capture of the aforesaid prize ; and that the said captain *Mowatt* in issuing these orders, acted only in pursuance of, and under the aforesaid additional orders and instructions given to him by the said vice-admiral *Murray* as commander in chief as aforesaid : And he further made oath that he hath been informed, and believes, that the said vice-admiral *Murray* received his regular pay as the flag officer and commander in chief on the aforesaid station, until on or about the said 2d day of *January* 1797, the day on which he struck his flag, and also his table money allowance, as commander in chief as aforesaid (and which is not allowed to any officer but a commander in chief), up to the said day ; and that the said *James Browell* was paid as secretary to a vice-admiral and commander in chief, and not as secretary to a vice-admiral only, up to the said day ; and that such payments were made by the Navy Board in obedience to a warrant in writing from the Lords Commissioners of the Admiralty ; and this deponent hath also been informed, and believes, that the said vice-admiral *Murray* also shared as a vice-admiral and commander in chief, in a prize taken by the ship in which he came to *England* in his passage home ; and he further made oath, that the paper writing hereunto annexed, marked with the letter A, is, and doth contain, a true copy of the additional orders and instructions herein-before mentioned to have been given by the said vice-admiral *Murray*, as commander in chief as aforesaid, previous to his departure from *Halifax*, to the said captain *Henry Mowatt* ; and that the paper writing also hereunto annexed, marked

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duct of all vessels under their command, and were aiding and assisting by their counsel and advice : That

marked with the letter B, is, and doth contain, a true copy of the letters sent by the said vice-admiral and commander in chief to the Lords Commissioners of the Admiralty, advising them of his arrival in *England* from *Halifax*, and his intention to strike his flag, with the concurrence of the commander in chief of His Majesty's ships and vessels at *Spithead* and in *Portsmouth* harbour; not presuming, as the deponent believes, so to act, or come to *London* upon his own authority : And he lastly made oath, that he hath been informed, and believes, that the Lords Commissioners of the Admiralty, always considering the said vice-admiral *Murray* as commander in chief of the *Halifax* station, did, upon their receiving his said letter, and not before, transmit a commission to vice-admiral *Vandepet*, then on the *Lisbon* station, appointing him commander in chief of the *Halifax* station, and directed him to proceed thither, and take upon him that command, in consequence of which he did proceed with all convenient dispatch, but did not arrive on his station, nor assume the command until the 14th of *April* following.

A

By George Murray esquire, vice-admiral of the white, and commander in chief of His Majesty's ships and vessels employed and to be employed in the river *St. Laurence*, and along the coast of *Nova Scotia*, the islands of *St. John* and *Cape Bretor*, in the bay of *Fundy*, and at the islands of *Bermuda*.

Asia,
Thetis,
Resolution,
Thesebe,
Topaz,
Prevoyante,
Raison,
Esperance,
Lynx,
Bermuda,
Rover,
Hunter,
Driver,
Dasher,
Spencer.

Whereas I think it necessary to proceed to *England* in His Majesty's ship *Cleopatra*, without loss of time, you are hereby required and directed during the time of my absence, or until the arrival of another commander in chief on this station, to take the ships and vessels, named in the margin, under your command, and any other ships commanded by a junior officer to yourself, which may arrive here, and intended for this station, and employ them to

That the clause describing the return of the commanding officer from *Jamaica* or elsewhere, &c. must be understood of one who had actually and intentionally *quitted*, and *abdicated* his command; that

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to the best advantage for His Majesty's service; taking care to observe the orders and directions given you in the general instructions delivered to you, and to attend to the following arrangements for the squadron under your command, for the ensuing winter and spring.

I have informed my Lords Commissioners of the Admiralty that it was my intention to make *Bermuda* my general rendezvous for the winter months, and requested that any additional force or orders for me might be forwarded there; you are, therefore, to make that place your rendezvous until the 1st day of *April* 1797, and cruise yourself, and detach the ships put hereby under your orders, to cruise to the southward of the islands, and at such other places as may seem best, from the intelligence you may procure, keeping the ships more or less collected according to the probable force of the enemy; you are to take all opportunities to annoy the enemies of *Great Britain*, and to protect and assist the subjects and allies of His Majesty, taking care to correspond with His Majesty's ministers and consuls in the United States for the purpose of mutual information and co-operation.

You are to observe that it is the wish of the government at home to cultivate the friendship of the United States by all honourable and conciliating methods; you are to cause the ships that sail from this place to victual for six months of all species, or as much as they can stow, that as little occasion as possible for purchasing at other places may at any time exist; should it from any unforeseen circumstance become necessary, the *Chesapeake* is the properest place, but you are carefully to guard against using the ships' boat in any communication with the shore in the *American* ports, as there is so great encouragement given to deserters. Water can be procured in great abundance in *Bermuda* from the wells there, if the tanks are not supplied.

You are to cause the times of the sailing of the ships which want repairs at present from this port to be so divided as to bring you

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that the understanding of the service was strongly in favor of this demand; that the secretary's salary was allowed till the admiral had actually struck his flag; that the admiral's own pay continued; that

as

you the dispatches which may come out during the winter months, and you are to take care that some of the smaller vessels are in the bay of *Fundy*, and on this coast, as early in the spring as any attempts can be made by the enemy's privateers to distress the trade of these Provinces. The ships that sail successively from this place, in the winter, should have orders to call at *New York* for dispatches, &c.; the packets generally go there, at that time, instead of *Halifax*; you are to order the supernumeraries now on board the ships of the squadron, and which were lately part of the crew of His Majesty's ship *Active*, to be distributed between the *Hunter* and *Rover* sloops of war, in equal proportions, unless orders should arrive to purchase the *Elizabeth French* frigate into His Majesty's service, in which case they are to be divided between the three ships, in such proportions as may be best to the forwarding of the service.

You are to remain on this service until the 1st of April next, when you are to proceed to this place, where you will probably receive orders for your further proceedings, should they not be sent you before to *Bermuda*, or a commander in chief arrive to take the command of the station.

And you are to leave your most probable rendezvous with the senior officer and commissioner *Duncan* when you sail hence, and take the same precaution when you leave *Bermuda*, that you may be readily found should you be wanted.

Given under my hand on board His Majesty's ship *Cleopatra*, *Halifax*, November 1, 1796.

(Signed) G. MURRAY.

To

Henry Mowatt esquire,
Captain of His Majesty's ship
the *Assistance*.

By command of the admiral,
(countersigned)

Alexr. Urquhart.

Cleopat.

as the duties and emoluments of the office must be deemed to be reciprocal, the continuing of the pay was proof of his responsibility still attaching; and that, in its turn, was to be taken as a strong proof, to shew that he was to be considered as entitled to all the incidental emoluments and perquisites of his station, as well as the direct pay; that the mere act of returning did not extinguish the command, unaccompanied by any other circumstance; and that the whole of the clause alluded to must be understood to apply to vessels left under another commander, under another appointment, under a flag officer at least; as the whole of that part of the proclamation related to flag officers.

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B

Cleopatra, off the Start,
January 1st, 1797.

I beg you will inform the Lords Commissioners of the Admiralty, that in pursuance of my intention, signified to them by captain *Pender*, in his letter of the 29th October, to go to *England* in a frigate, I sailed in His Majesty's ship *Cleopatra* on the 12th of November, leaving the squadron in charge of captain *Mowatt* during my absence; or until the arrival of another commander in chief. I inclose for their Lordships' information, a copy of the orders I gave captain *Mowatt* on my departure.

(Signed) G. MURRAY.

Cleopatra, Spithead, 2d Jan. 1797.

I beg you will inform the Lords Commissioners of the Admiralty of my arrival this day from *Halifax*, and that the state of my health being such that I can be of no service, and with the concurrence of admiral sir *Peter Parker*, I mean to strike my flag and come to town.

I shall set out to-morrow morning, and expect to be in town on Wednesday evening, when I shall acquaint you of my arrival there.

I am, &c.

(Signed) G. MURRAY.

Evan Nepean esquire.

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1800.

The Court, stopping the Counsel, desired to hear the argument on the other side.

Against the demand, Laurence and Swabey.—It will be proper first to call the attention of the Court to the words of the proclamation, respecting a commanding officer, which says, “when he is returning home;” these terms cannot be applied with more propriety to any person than the officer in question, who was returning home, without any hope or intention of going out again, to resume his command. In such a case, when he had passed the limits of his station, all his rights ceased; in the same manner as when a person is going out under an appointment to a station, his rights do not accrue till the moment of entering the limits of that station. But it is said that this is a different case, inasmuch as though he was personally absent, it was still under the particular orders left by him, that the force on that station was conducted. It may be proper, therefore, to advert to the terms of these orders. The instructions given by the Lords of the Admiralty purport, that they were to be delivered over to the next senior officer, and he is thereby directed to carry them into execution. Admiral *Murray* is, therefore, by the very terms, exonerated by the Lords of the Admiralty; his responsibility ceased, and the next officer was to carry into effect, *not the orders* of admiral *Murray*, but *the instructions* of the Admiralty. The responsibility so much relied on, did not, in fact, attach on admiral *Murray*; he was discharged from it; and the next senior officer was invested with it. To the same purport is the letter of admiral *Murray*, delivering these instructions; “Whereas I think

think it necessary to proceed to *England*, &c. you are directed to obey (*not admiral Murray's orders*), but *the general instructions handed over to you*;" and again, "you will detach ships to cruize, &c. in such places as may seem best from the intelligence *you procure*, taking care to correspond with His Majesty's ministers." There appears to have been no farther subordination reserved to admiral *Murray*; the whole management of the force and the communication respecting it, were to proceed immediately from the next senior officer, who was directed to remain on the station till *April*, unless *another commander* was appointed; from which it evidently appears that admiral *Murray* retained no thought of returning; but that he had actually quitted that station, giving such directions as his own instructions authorized him to give on such a contingency. On this view of the facts, it is not the case of a person retaining his responsibility, for the conduct of the station; but it is the case of a person exonerated by his instructions, and voluntarily availing himself of the permission they afforded, to retire when his state of health rendered him unfit to support the duties of his appointment. That his pay was continued to him is no objection; as it is in the power of government to continue that under various considerations, as long as they think proper. On these grounds it is submitted that the claim set up on the part of admiral *Murray* to share in this capture cannot be sustained.

In reply, the King's Advocate denied that admiral *Murray* had done any thing to abdicate his command; and contended, that he retained the power of returning in spring, if he had pleased; that the

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prize in question was made in the intermediate time, *December 1796*, not under the order of any other person, but under the immediate order of admiral *Murray*, as the other orders, which are said to have been issued by captain *Mowatt*, had not reached the capturing ship.

JUDGMENT.

Sir W. Scott.---The question in this case appears to me to turn on a very simple fact; whether admiral *Murray* had, or had not, abdicated his command, in pursuance of orders received from the Admiralty? If he had, he could not share; if, on the other hand he had not, it is acknowledged in the general understanding of the navy, and indeed it is admitted by the arguments of the gentlemen on the other side, that he will still be entitled. It is maintained that he had quitted his command, that he had handed over the instructions to the next senior officer, and that he had entirely discharged himself of his trust. This observation is grounded first on the clause of his instructions, which directs him to deliver them over to the next senior officer:---I confess it strikes me that this clause is so far from conveying any special order for admiral *Murray*'s abdication, that it must be a clause, either expressed, or at least necessarily implied in the instructions, that are sent out to every commander, if from sickness or other disability he becomes unable to continue in his command. The fleet must on such an accident not be left without care; the command *must* be devolved on some other person; it is no more than a necessary provision for such a substitution, as a variety of accidents may call for.

But it is said, that independently of these instructions,

structions, he had by his own voluntary act quitted his command; that the very coming home was a renunciation of the duties and emoluments of his station. This certainly does not appear to have been so considered and understood by himself, from the terms in which the orders and instructions are transmitted to the next officer, "during my *absence*:" the terms rather seem to imply that it was a mere temporary interruption of his actual presence and command, and nothing more. The orders are very minute, and contain very particular arrangements; they are such as he could not be entitled to give, but as commander of the station. Besides, it is to be observed, this is a capture made by a ship sailing upon a service directed under his express and immediate orders. Had it been effected *derivatively*, as I may say, under his command, and without any special designation to this particular service, I should still have thought that sufficient to entitle him to share, for the reasons I have stated; but looking to this additional circumstance of connection, I can have no doubt: It appears, not only, that he had not withdrawn himself, in such a manner as can be deemed a general renunciation of his command, but likewise that the capture was effected under express orders immediately proceeding from him.

Admiral *Murray* was pronounced to be entitled to an eighth as an admiral of the station.

THE ANNEMUR, SARREY Master.

May 13th,
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THIS was a case of a ship and cargo taken on a voyage from *Cadiz* to *Vigo*, and claimed on behalf of subjects of the Emperor of *Morocco*. On the original evidence some objection had been taken

A Moorish case.
—Construction
of the Moorish
Treaty, 1783—
Art. 3, 4.
—Restitution.

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ANNEXURE.

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against a manifest contradiction in the preparatory examinations, in which Moorish subjects were stated to have been sworn on the Evangelists. It was said that such depositions were not entitled to be considered as being taken on oath: It was further said, that there was no bill of lading, nor any document to prove the property of the ship or cargo; that the nature of the voyage, being from one enemy's port to another, furnished a strong presumption of enemy's interest.—Farther proof was ordered to be made.

On the production of farther proof, Laurence argued— That, independently of the proof of property, this was a case in which the Court was bound to decree restitution, under the Moorish treaty of 1761, [renewed 1783], articles 3 & 4. It was said that there was amongst the original papers a pass, in the usual form of the Moorish passes, and certified by the British consul at Tangiers; that the reason why the case had not been rested on this ground in the first instance, instead of submitting to farther proof was, that for want of a competent person to translate the papers this instrument had not come to light. The 3d and 4th articles of the treaty direct, "that all ships belonging to the subjects of the said King of Great Britain, and of the Emperor of Fez and Morocco and his subjects may securely navigate and pass the seas without being searched, &c." It was contended that this treaty left nothing to suspicion, that under these articles no inquiry or search ought to have been made; much less should the captors have proceeded as they did, to take out some Spanish prisoners, an act specially

prohibited by this treaty. In answer to a distinction suggested from the other side, that these exemptions applied only to the general course of *Moorish* trade, and not to trade between the ports of the enemy, covering and protecting the whole trade of the enemy: It was contended that as such a construction was not authorized by the practice of the Court in an analogous case; that no such limitation or restriction had been put on the *Dutch* treaty in the last war; that under the privilege which the *Dutch* enjoyed by treaty of passing unmolested and unsearched in time of war, it was allowed them to pass freely between ports of the enemy, in the same manner as on any other destination.

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JUDGMENT.

Sir W. Scott.—This is the case of a *Moorish* vessel captured on a voyage from *Cadiz* to *Vigo*, and carried into *Lisbon*. The depositions were there taken—I say depositions; because, although they appear to have been taken in a very strange and exceptional manner, by swearing *Moorish* persons on the *Evangelists*; yet I apprehend it was understood on all sides, that they were under the sanction of an oath; they are so brought in by the captors themselves: it would be very hard on the claimants if this mistake should now be applied to discredit their claim; I shall therefore look upon them as being by consent and understanding of parties, under the obligation of an oath; as such, they must be considered as containing the attestation of the owner himself—there is besides the *Moorish* pass, as to the ship. As there is nothing on the other side to shew that she ever appeared other than as a *Moorish* ship, the ship must be restored. With respect

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respect to the cargo, it is to be observed, that the master submitted in the first instance to farther proof; and I do not see that the party ever thought of putting his case on the stipulations of the treaty. The farther proof has been brought in, and it is in all respects concurrent with the original evidence in the cause. Speaking with reference to that sort of relaxation, with which we usually apply rules of practice to the inhabitants of that part of the world, I think it is sufficient.

Something has been said upon the treaty to which I am not disposed to accede in the extent that it has been urged. I am by no means prepared to admit, that the fair effect of such a treaty, can be carried to the extent of protecting a trade of this nature. It is not hastily to be admitted that in these times a treaty (and this is a very modern treaty) would be made with so improvident a meaning, that it might be applied to protect the whole trade of the enemy from the rights of British cruisers: I cannot conceive that the purpose of it was more than to protect the ordinary commerce of each nation. Till I am informed that it has been so construed by the superior Court, I shall not be disposed to put that construction on it. In the Dutch treaty case that has been alluded to, it is to be recollect, that the stipulation was more special, allowing them to pass unsearched expressly between the ports of the enemy (*a*); and the express allowance

(a) Explanatory article, 30th December 1675.

"Whereas some difficulty has arisen concerning the interpretation of certain articles, as well in the treaty marine, which was concluded 1st December 1674, as in that which was concluded 17th Feb. 1667, between His Majesty of Great Britain on the one part,

allowance of such a commerce so specifically described in that treaty, is rather an argument against the claim of such an indulgence, founded only on the general and indefinite terms employed in this.

Ship and cargo restored.

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ADMIRALTY.
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THE CAROLINA, HARTMAN Master.

May 13th,
1800.

THIS was a case of a cargo taken 14th Feb. 1798, on a voyage from Bayonne, ostensibly to Altona, but in fact to Ostend.

On the part of the captors the King's Advocate contended--That this was a case for condemnation in conformity to several precedents, in which the Court had refused to permit cases of this description, between ports of the enemy, with false papers,

Shipment for neutral merchants between enemies ports, but with a colourable destination to a neutral port--not admitted to further proof.

part, and the States General of the United Provinces of the Low Countries on the other, relating to the liberty of their respective subjects to trade unto the ports of each others enemies: We, Sir W. Temple, &c. and we, W. Van Henckelom, &c. have declared, as we do by these presents declare, that the true meaning and intention of the said article is, and ought to be, that ships and vessels belonging to the subjects of either of the parties can and might, from the time that the said articles were concluded, not only pass, traffic, and trade from a neutral port or place, to a place in enmity with the other place, or from a place in enmity to a neutral place, but also from a port or place in enmity, to a place or port in enmity with the other party, whether the said places belong to one and the same prince or state, or to several princes or states, with whom the other party is at war: And we declare, that this is the true and genuine sense and meaning of the said articles, pursuant whereunto, we understand that the said articles are to be observed and executed on all occasions, &c.; yet so that this declaration shall not be alleged by either party for matters which happened before the conclusion of the late peace, in the month of February 1672."

to

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to go to farther proof: That the bill of lading described the cargo as going to *Altona*, whilst in fact, the master deposed "that they were going to *Ostend*;" and "that other bills of lading of a different tenor, were left at *Bayonne*."

For the claimants, Arnold and Laurence argued--That this was not a case in which the claimants ought to be concluded by the act of the master or the merchants at *Bayonne*--That the master was not *de jure* the agent of the owners of the cargo; that they had a right to be admitted to shew, that it was a fair transaction in its origin, as it respected their orders; and that *they* were not implicated in any sinister purpose, which the master might have formed of going into *Ostend*. It was said that there were produced the regular papers, the charter-party and bill of lading, purporting a destination to *Hamburg* and *Altona*; that this destination was supported by the evidence of the other witness, in contradiction to the account of the master.--On these grounds it was prayed that they might be admitted to shew, that it was a fair transaction on their part; and that the goods put on board for their account, were actually to be delivered at *Hawburgh*.

JUDGMENT.

Sir W. Scott.--This is the case of a miscellaneous cargo going from *Bayonne* to *Altona*, and claimed for a variety of persons resident at *Hamburg* and *Altona*. The ship was claimed as the property of a *Prussian* subject, but that claim was abandoned: from which the counsel for the claimants would infer that the master is discredited by having been involved

involved in the collusive purchase : but I observe, on turning to his deposition, that he gave a fair account, and spoke out as to the infirmities of the title of the ship. He says besides, on the point now before us, " that he was directed to go to *Ostend*; that there two charter-parties, and that those on board totally misrepresent the property, and that he believes it to belong to *French* merchants." In opposition to this, it is contended, that the master's evidence is not complete proof, to conclude the owners of the cargo; and that they are not legally affected by his acts.—But I cannot help thinking that the master's testimony is the strongest that can be given, respecting the fact of destination : It may perhaps be not safe to rely entirely on him, as to the question of property, for he may be totally ignorant of it, and may entertain misapprehensions about it ; but if there is any purpose to be effected by a false destination, he is necessarily the person to whom that secret must be confided ; he is a witness entitled to great attention on that point, for he is the person who must necessarily be employed to carry it into execution ; and I hardly think that any injustice would be committed, by laying it down as a general rule, that where he is not fairly discredited, his testimony may be held conclusive as to that point. Then it becomes material to see how the cargo is entered on the ship's papers ; the whole is represented as to be delivered at *Altona* and *Hamburgh*: Had there been any fair contingent ~~deliberative~~ intention of going to *Ostend*, that ought to have appeared on the bills of lading; for it ought not to be an absolute destination to *Hamburgh*, if it was at all a question, whether

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whether the ship might not go to *Ostend*, a port of the enemy. There is then an undue and fraudulent concealment of an important circumstance, which ought to have been disclosed.--But it is said, that it would be extremely hard on claimants, if the acts of persons in *France*, giving orders contrary to their instructions, are to be held sufficient to affect them with penal consequences ; and it might be so ; although the hardship of being affected by the acts of agents, is a hardship, which the law is not very shy of imposing in a variety of cases--but it is to be recollectcd that the neutral claimants cannot in this case be penally affected, if they stand personally clear of the fraud which accompanies these goods. For if they gave absolute directions to the *French* correspondents to ship these goods for *Hamburgh*, and these *French* merchants have so departed from their orders, and have exposed this property to condemnation ; the neutral merchants will not be answerable for the payment; the only real losers will be the *French* shippers themselves. It is impossible that if the asserted owners are innocent of this fraud, they can in any way be losers by it.

On these grounds, I think, there is no reason to depart from the rule of this Court, which has hitherto refused to admit cases of this kind to farther proof(a).--Farther proof refused. Condemnation.

(a) June 8th, 1801.—In the *Margaretha Charlotte*, before the Lords of Appeal, a claim of Mr. *Willinck* was rejected on similar grounds, for several parcels of brandy, going *ostensibly*, by the ship's papers, from *Cette* to *Hamburgh*, but according to the master's depositions, under secret instructions to get into *Havre*. For the captor, it was contended, that the Court would not admit the case to farther proof, and the practice of the Court of Admiralty, and the

the case of the *Alliance*, before the Lords [7th Feb. 1801], were relied on. For the claimant, the King's Advocate argued to be admitted to farther proof, allowing the application of the rule, where the order was manifestly falsified; but contending that the deposition of the master, who was not *de jure* the agent of the cargo, was insufficient to contradict all the other evidence, and the uniform testimony of all the documents.—*Farther proof refused.*

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CAROLINA.

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1800.

THE CERES, RACKOW Master.

May 13th,
1800.

THIS was a case of a claim on behalf of Portuguese subjects for a cargo taken on a voyage from St. Ubes to Amsterdam.

The King's Advocate contended--That the subjects of an allied power were not at liberty to trade with the common enemy, and that their property taken in such a trade would be liable to confiscation in the prize courts of an ally, equally with the property of natural subjects. The case of the *Enigheid*, 21st March, Hankey's case, was relied on as an authority on this point.

Whether there has been a state of hostilities between Portugal and Holland, not determined—
Farther proof on facts.

Lords, 21st
March, 1795.
Vide supra,
vol. i. p. 210.

JUDGMENT.

Sir IV. Scott.—I do not know that there has been any declaration of hostilities between *Portugal* and *Holland*. The proof of property in this case is not sufficient—I shall not press the principle of law that has been urged, as I am not authorized to say that the relative state of the two countries is such as to justify the application of it. But I shall direct farther proof to be made of the property.

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Further proof
 falsified—Con-
demnation.

THE NEPTUNUS, Moswold Master.

THIS was a case of a cargo of wine and brandy, shipped in Spain ostensibly by the papers for Hamburg, but taken actually going to Guernsey. The claim was given on behalf of a merchant of Hamburg.

JUDGMENT.

Sir W. Scott.—The ship in this case was taken in the Channel coming with a lading of wine from Spain. The master in his deposition says, “Gautier and Co. of Barcelona were the laders of the cargo, and that it was to have been delivered at Guernsey to the consignee, who was, as he believes, the owner; as he received private orders, in contradiction to his papers, to deliver his cargo at Guernsey instead of Hamburg.” It appears likewise from his account, that there were two charter-parties signed; the one, given up on the capture, for a delivery at Hamburg, on a freight of 107 marks per last; the other, at a higher freight of 410, for a delivery at Guernsey; that these last were remitted to Guernsey, and were those to which he was bound to conform.

This account of the master is still further confirmed by the mate, who says, “that he believes the voyage was to have ended at Guernsey, as he was so informed by the freighters at Barcelona;” the evidence of these two witnesses does sufficiently establish to my conviction, that the real destination was to Guernsey; indeed the charter-party has been brought in, and the higher freight has actually

actually been allowed to the ship under that agreement. On this state of the original evidence it was necessary to order farther proof: That proof is now brought in; and if it is a *bona fide* case, it must necessarily apply to these two points, *viz.* to shew that there was originally an intention of going to *Hamburg* agreeable to former instructions; and secondly, that there were subsequent orders from the claimants, altering that destination, and directing the ship to call at *Guernsey*, and deliver her cargo there, as they had a perfect right to do; for certainly nobody can deny that Mr. *Nootnagel* of *Hamburg*, the claimant of this cargo, might import a cargo of *Spanish* wine into *Guernsey*, on his own account; and if the destination was merely colourable, to deceive *French* cruisers, or to conform to the regulations of shipments in a belligerent country, there would be no just right to complain; but the fact is, that the farther proof brought in, is in direct opposition to all this. The instructions to the master appear to have been absolute and final, to go to *Hamburg*, and the bill of lading expressed the same purpose; there was not a word of intimation that the master was, under any circumstances, to go to *Guernsey*; whereas he swears "that his private orders in *Spain*, upon which he was to act, were, that he should make the best of his way to *Guernsey*, and there deliver the cargo." How then can these be the real letters of orders sent to the *Spanish* shippers? How could the shippers be authorized, by these orders, to direct the master to deliver his cargo at *Guernsey*? It is said that the shippers at *Barcelona* have taken on themselves to speculate for their employer, and

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to order the master to deviate, and go to *Guernsey* for the account of the asserted owners; if so, they must answer it to them. But certainly this is no execution of the orders produced; the transaction in no degree conforms to them:—I am of opinion that these orders are fundamentally falsified. There are, besides, other circumstances, such as a total nonconformity of prices, a diversity of marks, &c., which all contribute to cloud the transaction. I have no doubt that the real truth of this matter has not been disclosed. What that truth is, it is not necessary for me to say, or even to conjecture. The claimant was to make out his case; the proof that he has produced, does not at all apply to this transaction—I am under the necessity of rejecting this proof, and pronouncing the property in question subject to condemnation.

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Colonial trade,
on the part of
neutral mer-
chants, on a
destination
between the
colony and the
mother country,
pronounced
illegal.—Cargo
condemned.

THE NANCY, Joy Master.

THIS was a case of a cargo of colonial produce, taken 7th Nov. 1796, on a voyage from *Surinam*, according to the papers, "for *Cowes* and a market;"—going at the time of the capture, ostensibly, and according to the master's account, to *Altona*—but as it appeared to the Court, *actually* to *Amsterdam*. The ship had been restored, by consent, on 24th Nov. 1796, reserving the question of freight; and, on 15th Sept. 1797, so much of the cargo as was the proceeds of the outward cargo from *America*, was restored; farther proof was directed to be made of the rest; and the application for freight on the part of the ship was rejected—On the 6th March 1799, still farther proof was directed.

JUDG-

JUDGMENT.

Sir W. Scott.—There have been two points made in this case on the farther proof which has been brought in; a question of destination, and a question of property; I shall first examine the proofs of destination, because if it should appear that this cargo was actually going from the colony to the mother country, on a *real* destination to *Amsterdam*, I shall hold myself bound to pronounce this cargo subject to condemnation; if I am wrong, the parties will have the benefit of resorting to the opinion of a Supreme Court; but I understand the rule of law to be, that the trade between the colony and the mother country in *Europe*, being opened by the enemy for his own relief under the pressure of war, cannot innocently be undertaken by a neutral; nor without the hazard of rendering him liable to be considered as giving immediate aid and adherence to that belligerent, to the unjust disadvantage of his adversary. If such a commerce can receive any aggravation, it is that of attempting to carry it on fraudulently, under the mask of false papers. It is said that there would be no occasion for concealment in this case; and that it is not probable there should have been any purpose of a fraudulent destination, since *American* ships have in a variety of instances, appeared to be going with an avowed destination to *Amsterdam*, without any apprehension on their part, that they were engaged in an illegal trade. But it cannot escape our recollection, that in most of the cases of this nature, that have come under the examination of the Court, there has appeared a very studious concealment of the real destination, and an extreme apprehension of the interruption of *British* cruisers.

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This ship was taken near *Dungeness*, and it is observable, that the master and the other witnesses very cautiously avoid saying, where the goods were to be delivered; the master on that interrogatory says, "That the voyage began at *Boston*, but he can say nothing respecting the delivery of the goods." The mate is equally succinct in his account; although they had got so far as *Dungeness*; neither of these persons, nor any of the other witnesses, can venture to say where the goods were to have been delivered. The voyage is represented to have been "for *Cowes* and a market," and in a paper which has been brought in, it appears that there had been an erasure of the word "*Amsterdam*," and that the words "a market" had been put in. It is said that this was no more than a mistake, immediately corrected: I cannot think it is probable, that such a mistake would have been made so lightly as it is represented; at the same time this alone is not such a discovery as the Court could hold to be at all conclusive; something farther arises, however, from the way in which the whole secret respecting *Amsterdam* has come out; and I am under the necessity of saying, that the farther proof which has been now exhibited, has not been brought forward in the most open and ingenuous manner.

The original papers described the voyage to have been to *Cowes* and a market. The Court directed farther proof to be given of the precise destination. In the proofs first produced, there appeared frequent references to letters in the possession of persons in this town, which were not exhibited. The Court ordered still farther proof, with the design of seeing these letters; and on this supplemental proof,

proof, it appears for the first time, that the word "*Amsterdam*" stands prominent in all the letters that were kept back, although it did not appear in any one of the papers first offered to the notice of the Court. I have been compelled to make these observations on the manner in which this farther proof has been brought in; although there is, independent of this, and in the former papers themselves, pretty strong proof to warrant me to consider the destination, as being actually to *Amsterdam*.

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N A N E Y.
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It may, perhaps, be necessary to state the plan of the voyage as it is described in the instructions to the master; the vessel appears to have been the property of persons in *Boston*, who sent her to *Surinam*, with directions to the master to enquire whether a cargo of produce could be purchased; if so, he was to load a cargo, and make payment by bills of exchange on *Europe*, for which they would find funds; he was then to go to *Europe* for a market, to stop at *Cowes*, and apply to Mr. *Dickinson*, who would give him further instructions, &c.; the reference to Mr. *Dickinson* proves, that the master was to put himself under the direction of that gentleman: This was the original plan of the voyage, on the part of the asserted owners (a); and that this is the right construction that has been put upon it by the gentlemen who have argued for the captors, is, I think, farther proved by the letter of Mr. *Fellowes*.—In pursuance of these directions, the master goes to *Surinam*, and meets with Mr. *Wilkins Andre*, whom I am surprized to see de-

(a) The claimant's counsel had represented it as a voyage from *America* to *Amsterdam*, with liberty to touch in *America*, or at *Cowes*, for a market.

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scribed, as a person retired from business ; whereas a person doing *a greater stroke of business*, as it is vulgarly termed, or exercising a greater monopoly in the business of that place, and, indeed, in *Dutch* business in general, can hardly anywhere be found.

- It appears that there was a letter (*a*) from the proprietor to this gentleman, advising him that if any of his friends wished to ship goods to *Amsterdam*, no ship would carry them safer than the *Nancy*, and recommending the master to him as a person of integrity. It is said that this recommendation meant only to describe him as an *honest* man, in the ordinary acceptation of the word ; but it is, in my opinion, exposed to a more harsh construction ; it is capable of being understood in a different sense ; especially when I see the sense in which Mr. *W. Andre* applies it, and other equivalent expressions, in a letter dated 31st *Jan.* 1797, in which he inveighs against the easiness of *American*

20th April 1796.

(*a*) I have, in company with Mr. *N. Fellowes* of this place, loaded the ship *Nancy*, captain *Joy*, with a cargo for *Surinam*. This vessel I intended to have addressed to our mutual friend Mr. *G. Aptorp*, but I have lately been informed that it was his intention, in the month of *March*, to proceed from *Surinam* to *Amsterdam* ; I have, therefore, been obliged to leave it to captain *Joy* to address the ship to such house at *Surinam* as he should find would transact his business upon the most advantageous terms for the voyage. But I should have given you the preference, had not captain *Brown* informed me that you was out of the line of mercantile business.

If you or any of your friends should wish to ship produce to *Amsterdam*, I believe it may, with great truth, be said, that no vessel will carry goods safer than the *Nancy*, and that no man possesses more integrity than captain *Joy* the master.

shipmasters

shipmasters and merchants, in these terms, "I freely confess to you that the bringing up and confiscation of captain *Wetherell* gave no small discredit to the *Americans* here; it was not without good reason; but I doubt not that the credit of merchants of a *good probity* will always keep their name and honor to rely and put trust in;" and again, "how can he [the owner] give his contentment said confiscation of the goods shipped for his account, since the captain, if he is a *man of honesty* cannot deny, according to his papers, that all the goods loaded are truly the property of the owner of the said ship." One may infer what this person's idea of a *man of honesty* is.

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NANCY.
—
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It appears from the correspondence, both in the letter of Mr. *Brown* and in the answer of *Wilkins Andre*, that the application was first made on the part of the *American* merchant; and although it is not very distinct, it is still sufficiently so, to be understood as an offer, made by these merchants, of an opportunity of shipping off produce to *Europe*. The principal letter of *Wilkins Andre* in answer to that of the owners is in these terms:—

"9th May 1796. With pleasure I acquaint you of the safe arrival of capt. *Joy*, by which I was favoured with a letter of Mr. *Brown* of the 20th of April last, which contents I have well understood. I have the honour to inform you that capt. *Joy* has addressed to me to endeavour to procure a freight for *Amsterdam*, or to buy for your account 500 hogsheads of sugar. It is very difficult to execute these two requisitions at present; in the first place, nobody will take any bill of exchange without a good indorsement of a very good accredited house

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here; and in the second place no planter will ship any produce for his account, because we have such disadvantageous intelligence here, that the *English* take or detain all ships, no color exempted, from the *Dutch* ports. Captain *Joy* would have made a very disadvantageous voyage, if I had not for regard to you, and upon recommendation of my friends *Mackay* and Co. procured him a credit for 15 or 20,000*l.* for which he has bought his cargo and has given bills of exchange for your account, payable at *Amsterdam*. I flatter myself that I shall soon hear from you that you have taken such measures that all the drafts of captain *Joy* shall be honored in due time."---And in another, 31st *January* 1797---"I did every thing in my power to his advantage, and the said bills were not transmitted before his departure from hence, in a manner that the payment of the same might be done with the money arrived out of his sold cargo."

The master's letter to the owner imports the same thing; it describes the transaction in the same manner, and represents the destination to have been "for *Cowes* and a market." This is the manner in which the voyage is invariably described in all the papers first brought in---to *Cowes* and a market; although it now appears in one paper (*a*) that *Amsterdam* was to be the actual destination: I cannot help thinking, however, that the letter from the owners to *Hodgson*, 5th *July* 1795, is of itself a most material document to explain what was meant by this term, "*Cowes and a market*." After having given an account of the transaction conformable to the representation of the letters of *Wilkins Andre*

(a) Letter of Mr. *Fellowes* to *Dickinson*, Sept. 1796.

and

and the master, it directs him to make insurance to the amount of 18,000*l.* on this cargo, "for *Cowes* and a market," and goes on, "I beg you to accept the said bills, and receive the ship and cargo when they arrive." This is written to *Hodgson*, a person at *Amsterdam*, and the person who was to provide the funds; this letter alone seems to point out sufficiently, that although the vessel was cleared out in that way, she was in reality to go to *Amsterdam*: In what other way was Mr. *Hodgson* to be able to receive the ship when she arrived? or, how can I understand otherwise, than that this very cargo was to be the fund, out of which he was to provide payment? The rest of the correspondence uniformly describes the destination to have been "for *Cowes* and a market:"--But when I find the fact to have been that the master never did touch at *Cowes*, and that he never held any communication with Mr. *Dickinson*, to whom his instructions direct him to apply, I think there cannot be more decisive proof that "*Cowes* and a market" was a designation fully understood by the parties, to point to *Amsterdam*. If the master had found reason to alter his voyage, and proceed for *Altona*, before he left *Surinam*, would he not have advised his owners of that circumstance, informing them, that he had found it more adviseable, to go directly to *Altona*? instead of that, I find the owners writing, five weeks after the vessel had sailed from *Surinam*, to Mr. *Dickinson* (a), Sept. 6th, directing an additional insurance to

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(a) Letter to Mr. T. *Dickinson* and Co. *London*, Sept. 6, 1796.

"If the insurance is effected agreeable to my order to Mr. *Hodgson*, it will be considerably short of the amount of property she

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to be made to *Amsterdam*, and expressing a hope that she will arrive safe: That the master must have resolved on the alteration of his voyage before he left *Surinam*, if any such alteration ever took place, is certain; because he appears to have spoken with no vessel during his whole voyage, from which he could receive any intelligence, to occasion such an alteration afterwards; nevertheless, although the master had quitted his intention of going to *Cowes* and a market; yet the owners are left in ignorance, and they write, directing an insurance on a *voyage to Amsterdam*, when they might have it effected at a much cheaper rate, on a *voyage avowedly to Altona*. Am I in opposition to all this to believe, that in the apprehension of the owners, there was no danger attending such a voyage, and that there was no reason for concealment; when by this very case, as well as in several others that have occurred, it sufficiently appears, that a destination to *Amsterdam*, was a thing of most anxious and industrious concealment, in all of them?

Looking at all these circumstances, seeing that the master never did apply to Mr. *Dickinson* for instructions; that at the time of the capture he had got as far as *Dungeness*,--considering that the master cannot say where the cargo was to be delivered --that the insurance was directed in the letter to Mr. *Dickinson* to be made for *Amsterdam*,--that Mr. *Hodgson* at *Amsterdam* was to receive the cargo, --that no funds were provided, and that imme-

she will have on board nearly 200,000 guilders, and there is only 180,000 £. ordered to be insured; therefore I wish you to have insured for me 1500 pounds sterling, in *London*, on the freight of that ship, at and from *Surinam* to *Amsterdam*, with liberty to stop at one port in the United States, and at *Cowes*, in *England*, &c."

diately

diately on the news of the capture (a) the bills were dishonoured; can I have a doubt, that the original voyage was to *Amsterdam*, and that this cargo was the very fund out of which the bills were to be paid? Adverting at the same time to the disingenuous manner in which the farther proof has been produced, and the necessity that has been imposed on the Court of dragging forward the separate parts, I cannot entertain a doubt that such was the real destination; or that if there ever had been any other destination at first, it was abandoned before the writing of that letter to *Hodgson*.

On the question of property I am far from thinking that the proof is satisfactory, or by any means complete. It is not necessary however to enter into that question: If I was obliged to decide on that point, I should not hesitate to say, that the property is by no means proved; and that the claimants have conducted themselves in such a manner, as to have forfeited the right of giving farther proof. But looking at the nature of this voyage (a), I think myself warranted in declaring my opinion, that it subjects the property to confiscation.

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(a) In the letter
of Wilkins
André to the
claimant.

(a) In the *Anne, Lord.*—A claim was brought before the Lords of Appeal on behalf of an American subject for a cargo of wine, &c. taken on a voyage from Rotterdam to Surinam. The sentence of condemnation of the Vice Admiralty Court was affirmed. The Court of Appeal declaring, “the grounds of their decision to be the illegality of the trade;” that the orders of council of 25th Jan. 1798, had not extended the relaxation so far, as to legalize the trade of neutrals, between the colonies and mother country of the enemy; that it had been always a prohibited trade, under the general commercial system of Europe, and was to be so considered, notwithstanding any temporary alteration of the system on the part of the enemy, owing to the pressure of the war, &c,

Lords, 29th
July, 1801.

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1808.

THE BEAVER, GRIERSON Master.

(Instance Court.)

Mariners
wages.—By
stat. 39 Geo. 3.
c. 80. s. 29. for
the regulation
of the African
trade, mariners
are not to be
discharged
abroad in that
service—

Wages given to
the time of the
ship's return to
Liverpool, &c.

THIS was a case of a suit for wages on the part of a mariner, stating, that he had been hired to serve in this ship on a voyage from *Liverpool* to the coast of *Africa* and back; and that he had been put on shore, and discharged.

On the part of the defendant, it was contended, That it was much more probable that the man had deserted, as he was a person of bad character, and had confessed he had been guilty of theft.

JUDGMENT.

Sir W. Scott.—By the act of parliament, 39 G. 3. c. 80. s. 29.(a) it is enacted, that masters shall not

(a) An act for better regulating the manner of carrying slaves, in *British* vessels, from the coast of *Africa*.

Sect. 29. And be it further enacted, That no officer, mariner, or seaman, shall be turned over or discharged, upon any pretence whatever, unless into His Majesty's ships of war, or to assist a ship in actual distress, which is to be certified by the principal officer of the ships concerned, and an agreement so made in writing with the said officer or men so lent, or upon preferment, or under ill state of health, with the consent of the party, for which a certificate shall be given from the captain of any of His Majesty's ships or vessels, if any are present, or in their absence, two justices, or the collector or controller of the customs, at the place or port where such ship or vessel shall be, or shall first arrive; which certificate shall be returned with the muster-roll and log-book, on the arrival of the ship at her delivering port in *Great Britain*.

be

be at liberty to discharge a mariner *abroad* in this trade; therefore a *discharge* cannot be set up as a defence. The hiring and the service are proved; it appears that the man had infirmities about him, and on that account took lower wages. The petition pleads that he was discharged---To discharge a person in this situation, is not only a great violation of common tenderness and humanity, but it is in direct contravention to a late regulation of the legislature. It is attempted to be proved that the poor man deserted, and that he had confessed he had been guilty of theft. But I cannot attend to such grave objections so slightly supported. There is no just and solid ground of defence to the suit.

Wages decreed.

Swabey, on the part of the mariner, prayed---That the Court would pronounce for the wages as due till the return to *Liverpool*.

Court.---The man has been unlawfully discharged; and the suit has been unconscientiously defended; I shall decree wages to the extent prayed.

THE GUARDIAN, BEATON Master.

May 22d,
1800.

(Instance Court.)

This was a case of possession, on a suit brought by Mr. *Coppinger*, to recover the possession of the ship against Mr. *Thelluson*.

Cause of pos-
session—suit
not entertained,
in a case of litig-
ated property.
—Warrant
superceded.

In opposition to the demand, the King's Advocate and *Swabey* submitted---That no warrant had been granted

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granted by this Court, for a long course of time, in any cause of possession, unless in cases where there was a clear *constat* of property; where the only question was, to *dispossess* the master, under the act of a majority of interests in the ship; that the present case involved in it a litigated question of property, and was on that account a case of a description which the Court had of late years studiously avoided to entertain.

On the other side, Laurence contended--That it was altogether a cause of possession; that Mr. *Coppinger* was the person holding the legal property, in the legal title of the ship, the register; that having exhibited his title, he had a right to come and demand legal possession under it, by the aid of this Court.

The King's Advocate replied--That the legal interest was in Mr. *Thelluson*, who had been navigating the ship two years, under a register granted to him; that the ship was assigned to him as security for a debt, under an agreement to re-assign when the debt was discharged; that had not taken place, and till then, the legal property was to be considered as vested in him.

Laurence said--That Mr. *Thelluson* had acted only as the agent of Mr. *Coppinger*, carrying the freight to his credit.

JUDGMENT.

Sir W. Scott.--This Court would be extremely unwilling to travel at all into a question of property,

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perty, more especially in such a case as this, where it must first enter into an examination of accounts, on which the parties are at issue. It is a case entirely proper for the discussion of other Courts; to which this Court will undoubtedly be auxiliary, in handing over the property, as soon as it is determined in whom it legally resides; if the use of its process can be deemed serviceable to justice, in carrying their judgments upon that point, into direct execution. It is said that Mr. *Thelluson* was put into possession, as a security for a debt; under an agreement, that his title in the ship should become absolute at a certain time, if the debt was not discharged: that the time is now elapsed, and therefore that the agreement operates as a bill of sale--But if so, why has the freight been brought to the account of Mr. *Coppinger* since that time?

[Answered--Merely for the purpose of giving a satisfactory account, if the ship should prove of greater value than the debt.]

It is certainly too much for me to say, on any view that I can take of the matter in its present form, that Mr. *Thelluson* is clearly to be considered in the naked character of agent. It appears that he has exercised a possession, as owner, in appointing masters, in obtaining registers, &c. &c. It is a question proper to be decided in another Court, the title of property being disputed between the parties.

Application for a warrant superceded.

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THE KIERLIGHETT, SPOEREWIG Master,

Condemnation
in Norway be-
fore a French
consul, invalid—
not helped by a
sentence of a
court of prize in
the enemy's
country, decre-
ing restitution
to the neutral
claimant, on the
circumstances
of a subsequent
capture, &c.

THIS was a case of a *British* prize ship taken by the *French* and carried into *Norway*, and there sold, under a sentence of condemnation of the *French* consul, to the present *Danish* claimant. It appeared that the ship had been afterwards, whilst in the possession of the purchaser, captured again by the *French* and carried into a *Spanish* port, and condemned there, on that capture, by the *French* consul---notwithstanding the claim of the former purchaser.—On appeal to the superior court of prize in *Paris*, she was directed to be restored. After this restitution, the ship continuing to be navigated as the property of the *Danish* merchant, came to the port of *Liverpool*, where she was arrested on the part of the former *British* proprietor.

An appearance was given for the *Danish* pur-
chaser under protest.

*For the Danish purchaser, Arnold argued—*This case does not fall under the authority of the *Flad-zen* (1st Admiralty Reports, page 135.), none of the mischiefs to be apprehended from the practice of passing sentence of condemnation, in a neutral country, can be applied to this case. The subsequent fortunes of this vessel have carried her, if not into the ports of *France*, at least into the ports of an ally in the war. The sentence passed on her, lying there, has been carried by appeal to the superior tribunal of

of *Paris*, where the title of the present purchaser has been allowed by a decree of restitution. This is to be considered as a virtual affirmation of the title under the former condemnation, and therefore this case is not distinguishable from the case of ships legally condemned, and transferred to neutral purchasers; in which, the legality of such conveyance was never disputed in this country.

On the part of the British proprietor, Swabey.—The sentence of the Court of Appeal in *Paris* is not to be considered, in any manner, as an affirmation of the former proceedings on this ship in *Norway*. It nowhere appears, what the grounds were, on which the second capture was attempted to be sustained; there is nothing therefore in this latter part of her history, which is in any way connected with the fact on which we rely—the illegal conveyance of this property in the first instance, under an invalid sentence of condemnation in *Norway*. That being the case, there is nothing to distinguish this case from the case of the *Fladozen*, unless it be the mode of commencing this enquiry: In that case, it arose in consequence of a capture on the high seas: In the present instance, it has been by a warrant, in a cause of possession against the ship, which had come voluntarily into the ports of this country: That this is a proper mode of proceeding in such cases, is clear from an old case in the time of Sir *Charles Hedges*, the *Constant Mary* (a), which went afterwards

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¹ Adm. Rep.
p. 135.

Adm. 22d Aug.
1696.

(a) This was a case of an *English* ship, captured by a *French* squadron under the command of admiral *Du Bart*,—June 1691, about five o'clock in the morning, and sent, the same evening, or the next morning (according to the master's evidence), out of the fleet to *Bergen* in *Norway*; although it was pleaded in *Thermohlen's* allegation,

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The
KIRRIEHOOT

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1802.

(a) 12 Mod. 143.
Cartew, 423.

afterwards to the Delegates, and is reported in the common Law Books (*a*), on a question arising on prohibition.

On these grounds it is submitted, that we are correct in the mode of proceeding, and are entitled to have the protest over-ruled, and restitution decreed to the *British* owner, under the authority of the *Constant Mary*, as to the mode of proceeding—and under the principles laid down in the *Fadozen*, in respect to the illegality of the transfer, under a sentence of condemnation in *Norway*.

JUDGMENT.

Sir W. Scott.—Among the many novelties, that the *French* have introduced into the world, the condemnation of prize vessels in neutral ports, under the authority of consular courts sitting there, is not the least extraordinary. These condemnations, sustained by the tribunals of *France*, may be good and valid against *French* subjects, on a second capture by *French* cruisers, or in any other way, in which they may come before them in transactions amongst their own subjects, as considered

allegation, that she continued in the fleet, as in a place of safety, three weeks. It was alleged also, that whilst she was in possession of the *French* fleet, and before she was sold in *Norway*, she was condemned as prize in the Vice Admiralty Court of *Dunkirk*, though not carried into a *French* port. By the report of the case in *Cartew*, p. 423. it appears as if some doubt had been entertained of that fact, as it is said, “no such sentence could be made out in proof.” In the process, now remaining in the Court of Admiralty, it does not appear that any of the witnesses examined on the allegation spoke to that fact, or that any copy of the condemnation or other document was exhibited to prove it.—The ship was arrested in the port of *London*, at the suit of the original owner, 30th May 1695, and restored to him by a sentence of the Court of Admiralty, 22d August 1696—affirmed afterwards by the Delegates on Appeal, 31st Dec. 1797.

by

by the law of their own country; but they are not binding on other countries. This Court, as representing this country in such matters, has already signified its opinion upon them.

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KIERLICHETE
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1800.

This was a case of such a condemnation in the first instance; and if that had been all, there could have been no question about it; but it appears that there has been a subsequent *French* capture, after a purchase made by a neutral subject; and that the vessel was then carried into a port of an ally of the war; which may, for the purpose of this argument, be considered as a *French* port. A second condemnation passed there; and on appeal, the superior Court at *Paris* reversed that sentence, and decreed restitution to the *Danish* claimant:—on what grounds either of these decrees passed, we are not informed. The former of these sentences could not have been on any ground of defect in the condemnation in *Norway*; because condemnations of that species are sustained in *France*; it might be for want of requisite documents, or for having *British* goods on board, or on some of those arbitrary, and fanciful, regulations, which the irregular policy of *France* has established, as their expositions of the law of nations. There is nothing to shew, that the reversal of the second condemnation, passed upon any ground, that had a connection with the first condemnation in *Norway*, or, that affirmed that sentence, upon any view of its particular merits. If it affirmed it in any manner, I presume it would do so, only on the general ground, that these consular condemnations were to be sustained; in which it would be just as good as that condemnation, and no better. But in truth, I presume that it must have turned upon other questions, totally foreign to it; it

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never could have been, that the validity of such a condemnation had been disallowed by the inferior French Court, so as to make it necessary for the superior tribunal to support it by a reversal. I think, therefore, that these second proceedings in France add nothing to the real authority of the first proceedings in Norway; and as those proceedings cannot sustain the title of the neutral purchaser, I must over-rule his protest, and admit the claim of the original proprietor.

An absolute appearance being given for the *Danish* purchaser, *Arnold* prayed on his behalf, that an allowance might be made to him, for the amelioration which the ship had undergone in his service.

On the other side, Swabey said--That in the *Constant Mary* the same demand was made, but rejected by the Court;--that a purchaser under an illegal title must take the consequences of his own imprudence; and could support no claim to be indemnified for intermediate expences.

Court.--I am obliged to Dr. *Swabey* for a case very much resembling the present, a case of great antiquity in this Court. In that case the demand for amelioration was refused, though not without a considerable difference of opinion between the Delegates. Under the irregular practice which has prevailed, to a great extent, of carrying ships for condemnation into neutral ports, an individual might be led into an honest mistake; on this principle in the *Perseverance*, I did decree something of an allowance to be made for amelioration. In the same manner I am not disposed to consider this purchaser, as a person buying under a title *notoriously bad* at the time of purchase; in such a case as

as a *malæ fidei* possessor, he must have taken the consequence of his own imprudence. As to ordinary repairs, the Court does not usually take any notice of them; the use of the ship must be set off against them.

It appears in this case, that there is a person holding a bottomry bond, incurred on the ship and cargo, though it does not appear in what proportion, or how far he has been indemnified out of the cargo. If the bond is for mere ordinary repairs, it must fall under the considerations which I have first stated. The proper rule for the registrar and merchants to pursue, will be to consider the *quantum* of the improved state, in which the ship comes into the hands of the original proprietors. As to that part, it is not a restitution to them, but a new acquisition; this is the point to which I wish the registrar and merchants to apply their attention; and under this direction, I shall refer it to them to report on the *quantum* of amelioration.—Ship restored to the former owner.

THE RACEHORSE, WHITE Master.

THIS was a case of a *British* ship freighted from Liverpool in ballast to St. Martins and Lisbon, to bring a cargo of fruit to Ireland,—taken on her return voyage by a French privateer of Falmouth; and afterwards recaptured and brought to Falmouth. The present question arose, respecting the *quantum* of freight due from the cargo to the ship.

On the part of the owner of the cargo, the King's Advocate.—There is no ground in this case to demand more of the owners of the cargo than a freight *pro rata itineris peracti*; had the contract subsisted,

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Freight, be-
tween ship and
cargo; whole
freight pro-
nounced due,
on a ship re-
taken from the
French on a
voyage from
Lisbon to Ire-
land, and
brought into
Falmouth, &c.

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RACEHORSE.

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1 Adm. Rep.
p. 289.

and a claim been given for the cargo by those concerned for the ship, there might have been ground, for a claim of demurrage; but then the owners would have had the benefit of the original shipment; the cargo might have gone to its final destination, and the whole freight would have been due; instead of that, the agents for the ship chose to consider the contract as dissolved, they proceeded to sell the ship, and thereby deprived the cargo of the benefit of the entire voyage; it is not for them therefore to claim more than a proportionate compensation, for the service rendered in bringing the cargo hither. The *Copenhagen* is a case in point; in which the cargo being obliged to be sent on at the expence of the owners, the Court decided that only a *pro rata* freight was due to the ship: In this case the same consequence has arisen; the Court will pursue the same equitable rule, and give a *pro rata* freight; deducting from the original contract, so much as the amount of the expences which the owner will sustain in completing his purpose, and sending the cargo on the original destination to *Dublin*.

On the other side, Robinson.--The present case can by no means be considered as coming under the principle of the decision of the *Copenhagen*: That was a case arising on a detention of the ship and cargo, which had been driven into a port of this kingdom by stress of weather, and damage sustained on the part of the ship: it had become necessary that she should undergo repairs; and during those repairs a seizure was made in the nature of prize.--Much time expired, before the character of either ship or cargo was so proved as to produce a sentence of restitution;

restitution; and at last the cargo was liberated on farther proof, before the ship could obtain restitution. In that case, the original cause of detention arose from a common accident, and damage sustained by the ship; there remained a considerable portion of the voyage, for which the owners of the cargo were to provide shipment, at their own expence; as the ship was not released, and able to proceed. Here, the ship had gone out in ballast, entirely in the service of the cargo, and had performed almost the whole of the returned voyage; —as to her own labor and expence, that had been as great in coming into *Falmouth*, as if she had gone to *Dublin*, according to her original destination: When at last they were brought into *Falmouth*, the ship was restored, and set at liberty, before the cargo was claimed; unlivery became necessary according to the practice of the Court; and it was not in the power of the person concerned for the ship (who was but the administrator under the insolvent estate of the owner) to make a new contract. He went to *Falmouth* and found the ship unladen; it is not even suggested that any application was made to him to carry on the cargo: Under these circumstances the ship is in equity entitled to a freight, as large as that agreed upon for her original voyage; or if the Court shall be inclined to make any abatement; it will certainly not be in the proportion of a reshipment of these articles in another vessel, or by directing this ship to carry them on: That would be to make the ship in some measure insure the arrival of the cargo, at her own risk, and at a greater expence, than could have entered into the contemplation of the parties to the

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RECEIVER,
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1808.

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RACEHORSE.

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original contract ; inasmuch as a divided voyage at different times and under different shipments, must be supposed to be more onerous and expensive, than an original and continued voyage of the same extent, when the ship was victualled and equipped ready for the occasion.

JUDGMENT.

Sir W. Scott.---This is a case originating in the misfortune of a capture by the enemy ; which, however, a subsequent recapture and recovery must prevent the parties from considering as the grievance of a total loss and misadventure, notwithstanding that some delay and expence have arisen out of it.

It is much to be regretted, that charter-parties do not contain provisions for the case of capture and recapture ; it is an accident that frequently occurs, and it would have been extremely natural, that some provision should be made for it : yet, in almost all the charter-parties that I have seen, it seems to have been as much out of the consideration of the parties, as if there had been no such thing as capture in the world.

This ship was chartered to go from *Liverpool* to *St. Martins*, and on to *Lisbon*, for a cargo of fruit ; there, not finding a full lading of fruit, the master consented to take in wine, out of accommodation to the owner of the cargo, and was captured on her returned voyage off *Falmouth* ; a great part of her voyage was performed, the outward voyage entirely, and a great part of the returned voyage, and solely in the service of the freighters ; the master, it appears, was taken out on the first capture, and owing to that circumstance, no claim was immediately given

given for the cargo. The owner of the ship being dead, the care of the vessel devolved on his administrator; no blame is imputable to him, that he did not interfere with respect to the cargo; his duties were duties of caution, he could not be expected to do all that the master or the owner himself might have done; it was natural for him to confine himself to the concern of the ship, and without intermeddling with the cargo, to act only in such a manner as seemed best for the interests of the estate of his party. The ship was restored by consent on the 2d of *July*, whilst no claim was given for the cargo till the 17th of *July*, and restitution did not pass till the 16th of *November*; the case of the cargo was litigated---and is the Court to say that the ship was to stay and wait the result of the proceedings, when she herself had been restored, whilst the cargo was contested, and might be condemned, and whilst it was by no means clear, that any cargo would remain to be carried on? This would be an unreasonable expectation. I do not say that a party is to act in an hasty manner, and to run away immediately on the restitution of his ship. Something is to be conceded in the way of accommodation; a reasonable time is to be allowed, and if it is not allowed, a proportion of the freight may be deducted. But I cannot say that a ship shall wait all this time for the mere chance of taking on the cargo, if eventually it should be restored. It is said, that the contract was totally dissolved; but by whose means happened it that it was so dissolved? It was in no degree owing to the owner of the ship, who might have carried on the cargo, but that the owner of the cargo was not ready to proceed:

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ceed: Though he acted as discharged from his contract, he is substantially entitled to the benefit of it. On these grounds I am of opinion that the ship is entitled to her whole freight.

It was prayed on the part of the owner of the cargo, that one-eighth of the freight might be deducted for the salvage, which they had paid on the freight.

It was said on the other side, that the owner of the ship had settled with the recaptors for salvage.

Court.—For the ship; but salvage is due for the ship, cargo, and freight.

Prayer granted.

Adm. 12th
March 1801.

In the *Martha Martin*, a similar question arose, as to freight on an American ship from America to Amsterdam, captured in the Channel, 20th December 1800, and brought in.—The ship was restored, with freight, on the 10th of January. On the 15th January, a commission of unlivery passed; and on the 16th, one parcel of goods, for which a claim had been given, was restored. The unlivery was directed to be suspended as to those goods; but it being necessary to move them, in order to get at the rest of the cargo, they were unlivered. On the part of the claimant of those goods, it was demanded of the master, that he should take them on board again (the claimant offering to be at the charge of the re-shipment), and carry them on, upon the original freight. On the other side it was contended, that the master was entitled to have his whole freight pronounced due, without being charged with any farther services; that the ship had suffered a long demurrage and some damage during that time; that the object of her returned voyage was frustrated by the delay; and that it would expose her to great inconvenience to go on with a part of her cargo only.

JUDGMENT.

Sir W. Scott.—This is a case in which some loss must fall upon one of two innocent parties, both of whom, I fear, it will not be in the

the power of the Court to protect. One is a carrier master, who is, if I may use the expression, a favourite with the Court, the other, the owner of a cargo engaged in an innocent commerce. The ship has been released, and the cargo also; but it has happened that it became necessary to univer the whole cargo, in order to get at a parcel of goods, for which no claim was given. After what I have said, I should have thought it my duty, to look very particularly into all the circumstances attending this case, if I had not met with one determined by my predecessor, which comes so very near to the circumstances of this case, that I can find no distinction between them. It is the case of the *Hamilton, Rodman*, Adm. 20th Nov. 1793, an *American* ship retaken from the French, and brought in, May 1793, on a voyage from *Lisbon* to *Petersburgh*. The ship was restored immediately, with some part of the cargo claimed for the owner of the ship; the remainder of the cargo was claimed on the 5th June, and restored on the original evidence on the 9th of August. The cargo had been unloaded, but the ship was not gone away at the time of the restitution; and a demand was made upon the master to take the cargo on board again, and proceed on his original voyage; but he refused, and went away with the ship, and the owners of the cargo were obliged to find another conveyance for their goods to *Petersburgh*. On the 20th of Nov. 1793, the question, as to the freight, was brought before the Court: and it was objected, that it was not due, as the ship had not performed her part of the contract; but the Court decreed the whole freight, to be a charge on the cargo.—This case is so exactly in point, that I can see no distinction between it and the present case. As long as that case stands uncorrected by the Superior Court (if it requires any correction), I shall think myself bound to follow it; though I am sorry to say, it may in particular instances fall with hardship on the owners of cargoes.

The
RACEHORSE.

June 13th,
1800.

*June 13th,
1800.*

THE NEPTUNUS, LAMPE Master.

Tallow not contraband to Amsterdam—restored.
Sail cloth universally contraband, even to a port of mercantile equipment, condemned.

THIS was a case of a miscellaneous cargo taken 12th June 1798, on a voyage from *Cronstadt* to *Amsterdam*. Farther proof had been directed to be made on several claims for different parts of the cargo.

On a claim for a quantity of tallow, on the part of a merchant of *Petersburgh*, the King's Advocate contended, that tallow was to be considered as a naval store, liable to confiscation as contraband.

Court.—I am not disposed to consider it in that light, on a destination to such a port as *Amsterdam*; *Amsterdam* is a great mercantile port, as well as a port of naval equipment; if it had been taken going to *Brest*, I should have had little doubt about it.

Restored.

On a claim for 275 bundles of sail cloth, as the property of a merchant of *Petersburgh*.

Court.—That is universally contraband, even on a destination to ports of mere mercantile naval equipment; *Amsterdam* is a port both of great mercantile and military equipment.

Condemned,

On prayer for the freight and expences of the ship, the King's Advocate contended that freight could not be given in a case of a contraband cargo.

Arnold

Arnold and Robinson.—The Court will not think it necessary to apply that rule, in its utmost rigour, in such a case as the present, where the contraband articles are but in a small quantity, amongst a variety of other articles.

The Court acceded.

Freight and expences given.

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NEPTUNE.
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THE GRAAFF BERNSTORF,
BELMER Master.

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THIS was a case of a valuable cargo taken on a voyage from *Batavia* to *Copenhagen*; the claim was given in the first instance for the whole cargo, as the property of the house of *Black and Co.* of *Copenhagen*, but after some circumstances respecting it had transpired, an amended claim was given, by leave of the Court, for the cargo, as the property of *Black and Co.* and a Mr. *Van Tromp*.

Parties having claimed to cover an enemy's interest, are not allowed to make further proof of their own property, engaged in the same transaction.

King's Advocate.—In this case the ship and part of the cargo belonging to the owners of the ship were condemned on a former day; the present question arises on a claim, given for the remaining part, as the property of *Black and Co.* The claim first described this part of the cargo, as the entire property of that house, but now admits under an amended form, the interest of a Mr. *Van Tromp*, and claims for him, and the house of *Black*, according to their respective shares. The history of this gentleman appears to be, that he was a *Dutchman* by birth and residence, till he lately obtained a formal domicil at *Copenhagen*; he then went out to *Batavia*, in the *Johanna*, and having disposed of the

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(e) Nancy,
Knudsen.

the outward cargo of the vessel, he purchased from the proceeds of that adventure, a quantity of colonial produce, which he shipped partly on board the *Johanna*, and partly on board this vessel chartered at *Batavia*; a third (*a*) vessel also appears to have been sent to *Batavia*, consigned to him, with a cargo of naval stores purchased in *Holland*, and completely documented with ostensible papers to *Tranquebar*, and with a certificate obtained by the house of *Black*, declaring that the actual destination was to *Tranquebar*. In that case, the question will distinctly arise, whether a person having sent out contraband articles under a false destination, can be admitted to stand up in a Court of a belligerent, and claim a cargo arising out of the proceeds of that contraband. It is stated here, only to shew, in some degree, the nature of the intercourse subsisting between these claimants and *Batavia*: The particular facts of the present case are shortly these: The cargo of the *Graaff Bernstorff* was documented solely for the house of *Black* and Co.; no mention whatever being made of Mr. *Van Tromp*, as interested in the cargo, nor as connected with it in any other manner, than as being the lader at *Batavia*; after the capture, proceedings were instituted on the 26th Feb.; and a claim was given in this Court, agreeable to the documents, on the 2d March, for the cargo as exclusively belonging to the house of *Black* and Co. The cause came on three months afterwards, and then also it was contended, that the whole property belonged to *Black* and Co. but it appearing in some letters written by Mr. *Van Tromp* to *Dull* at *Amsterdam*, (which were invoked from other ships, the *Nancy*, *Knudsen*, and

and the *Graaff Bernstorff, Bonge*, (a) that Mr. *Tromp* must have some sort of interest in this cargo, it was prayed that the parties might be at liberty to amend the claim. They now come forward, admitting the connection of Mr. *Van Tromp*; and say, —true it is, we are detected so far, but let us have restitution of the rest. It is impossible that the Court could restore this cargo in respect to the nature of the explanation, as coming only from the agent. But we contend farther, that after the fraud has been carried on so long, for the purpose of concealing the interest of this *Dutchman*; the parties cannot, under the principle on which the Court has acted, in the *Eenrom* (a), *Fronier*, and other cases, be admitted to sustain their claim by farther proof.

(a) 2 Adm. Rep.
p. 1.

(a) In the *Graaff Bernstorff, Bonge*, a claim of *De Coninck* and Co. and *Duntzfeldt* and Co. of *Copenhagen*, for the ship, and the chief part of the cargo, was rejected in the Court of Admiralty, June 14th, 1799. On appeal, the cause came on again to be heard before the Lords Commissioners of Appeal, on the 29th of July 1801; when the sentence of the Court of Admiralty was affirmed: The Court declaring, after a very full and perspicuous discussion of the evidence, “That the captors had made out the following positions, viz. that the property could not belong to the claimants, in the manner asserted on their behalf; that the purchase and management of the vessel in *Batavia*, had been conducted in a manner totally irreconcileable with the instructions, purporting to have been given to a person, sent out by them, with blank passes, &c. for the purpose of purchasing a vessel, to bring a cargo of *Batavian* produce, directly to *Copenhagen*, on their account; that it was also clear and indisputable, from papers invoked from the *Nancy, Knudsen*, that Mr. *Inglehardt* had some share in the property, although the exact proportion did not appear; that there had been such a fraudulent suppression, and concealment of his interest, as must preclude the parties implicated in it, either by their own acts, or the acts of their agents, from giving farther proof of their interest engaged in that transaction.

It

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It was argued besides from different expressions in the letters from *Van Tromp* to *Dull*, that they seemed to refer the management of this cargo rather to *Dull* at *Amsterdam*, than to the house of *Black* at *Copenhagen*, and that they pointed strongly to *Dutch* interests.

For the claimants, Arnold and Sewell.--It is submitted, that the fraud imputed to the parties in this case is not such, as will preclude them from giving farther proof. Mr. *Van Tromp* appears to have been recommended to the house of *Black* by *Dull* and Co. who are the *Danish* consuls at *Amsterdam*, and who furnished them with part of the outward cargo. This circumstance will account for many parts of the correspondence with *Dull*, against which exceptions have been taken; there are expressions of gratitude to them, and of a lively concern for their welfare; there are passages apprizing them of some complaints, that had been made of the bad quality of the outward cargo, complaints which it was natural to communicate to them, for their information, and for the information of their immediate employers through their house.--He went out in the *Johanna*.--

[*Court.*--On this part of the case, the national character of Mr. *Van Tromp* is a material point--Is it contended that he is to be considered as a *Dane*?]

Counsel.--He went from *Amsterdam* to *Copenhagen*, with a view of managing the cargo of the *Johanna*: to excite his attention and diligence he was allowed to have some share; he was admitted a burgher of *Copenhagen*, and engaged in the *Danish* trade, with an intention of returning again to *Copenhagen*.

It

It is true, he did not return in the *Johanna*; he staid at *Batavia*; but his stay was intended only to be for two months for the purpose of purchasing two other ships, and vesting his remaining property in them; his national character must be submitted to the judgment of the Court, on these circumstances. Some objections have been raised to shew that there was an ulterior interest in this cargo, in persons residing at *Amsterdam*; but these are matters of inference and surmise only, and do not afford any real ground of proof, that the property of this cargo is not, as it is claimed, belonging to the house of *Black* and Mr. *Van Tromp*.

It has been pressed, as an objection against the good faith of this case, that there has been a concealment of Mr. *Van Tromp's* interest; but no such imputation justly attaches on the management of this affair; if the real understanding of the parties, and the nature of their connection is fairly considered.

The whole transaction appears to have been taken up generally, with an allowance of a participation in the profits, as a reward to this man, as their agent. There might be a variety of concerns between them which would be to be settled on the arrival of this vessel in *Europe*; till that time the interests were to continue blended together, in some sort of confusion, perhaps, as it may appear to us, but in such a way as might still be perfectly distinct to them, and perfectly consistent with the fair course of trade, considering the general understanding and confidence subsisting between them. In this light it is not a case in any way resembling the attempt made in another case to cover the property of Mr. *Inglehardt*, or other persons actually

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Enron,
2 Adm. Rep.
resident p. 1.

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resident at *Batavia*; they were avowedly *Dutchmen*; this gentleman is a man considered by persons in *Denmark* as a *Dane*; there was no intention of covering the property of an enemy, as to his share. Besides, that share was not a distinct portion, but a mixed undivided share which, it was conceived, need not be separately averred, and defined here, any more than the several shares of partners in a house of trade, in ordinary cases. It is impossible to maintain against us, that there has been any fraud in this transaction, or any concealment that can be considered as a fraud, under the authority of any cases that have hitherto occurred; on these grounds it is submitted there is nothing to preclude the parties from obtaining restitution of their property.

JUDGMENT.

Sir W. Scott.---This cause now comes on upon a corrected claim, given for *Black and Co.* of *Copenhagen*, and *Mr. Van Tromp*; the former claim was given for *Black and Co.* only, and all the papers concurred in representing the property in that manner; so it continued to be described till the time of hearing: Then, from papers that had come to light in other causes, it became a matter of almost unavoidable admission, that another person had some interest in this cargo, and the Court called on the parties to explain that circumstance. The present claim is brought forward in an amended form, in obedience to that order, shewing that *Black and Co.* are the owners of much the greater part of the cargo, but that *Mr. Van Tromp* is the owner of some portion of it. I shall first dispose of the claim for his share, which must depend entirely on his national character;

character; on which I am clearly of opinion, that he is to be considered as a *Dutchman*; he is a person born in *Holland*, and living there till the time of the commencement of this adventure; when he removes to *Copenhagen*, and goes through the slight formalities of obtaining a burgher's brief—formalities on which, it is said, great importance is attached in *Denmark*, but on which other countries, which have to consider its real nature and effect, certainly can attach but little, in the estimate of a real national character. He embarks immediately on an adventure to a *Dutch* settlement, under an intention, it is said, of returning to *Europe*: but is at the time of this capture left residing at *Batavia*. It appears from other papers that he considers himself as a *Dutchman*; he expresses a warm interest in the political events of *Holland*, *as his own country*; and evidently intends to return, and end his days there. To say that his *Dutch* character is purged off, by having made one voyage in a *Danish* ship, and under such circumstances, accompanied with an actual employment in a *Dutch* settlement, and with an intention of perpetuating his connection with *Holland*, by returning to end his days there, would be truly ridiculous. It is impossible to consider him as a *Dane*, or in any other light than in his original *Dutch* character; his share must be deemed liable to condemnation.

I come then to the question, in what manner the suppression of the interests of this person will affect the interests of others? It is a question on which great property depends; and therefore the Court is naturally disposed to consider it, with that tender deliberation, which objects of great value

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necessarily create; under these impressions, the Court would pass over nothing that could be urged, with any effect, for the claimants in such a case.

It may not be immaterial to consider the origin of this transaction; it was a voyage to a *Dutch* settlement, from *Copenhagen* indeed, but with a cargo procured in *Holland*. I do not say, that a neutral merchant may not very lawfully carry on such a traffic; purchasing articles in *Holland*, and afterwards employing them as he pleases, when they have become *bona fide* his property, and have been *imported* into his own country. But certainly it is not too much, on the other side, to observe, that the sending a cargo so purchased to a *Dutch* colony, does necessarily afford a strong ground of suspicion, that there are *Dutch* interests connected with it. It does not appear, I think, that there had been any orders sent from the house of *Black* and Co. for the purchase of the outward cargo: It was purchased by *Dull* and Co. of *Amsterdam*, but for *Black* and Co. as it is said; it does not, however, appear that the house in *Amsterdam* purchased under their directions, as their agents only, and as having no other connection with it. On the contrary, Mr. *Van Tromp*, the agent of *Black* and Co. writes to *Dull* and Co. about every thing relating to the outward cargo; about the quality of the articles, when sold; and likewise respecting the homeward voyage, and the ports of *Europe*, to which it might be most advantageous for the ship to return. These gentlemen in *Amsterdam* appear to have been persons who had more interest in this transaction, than as mere laders of the outward cargo. It is impossible for persons dealing *fairly*, in such a trade in

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in an enemy's country, not to feel that they are exposed to suspicion; so as to excite in them a reasonable prudence, as to the mode of conducting the transaction: It must occur, I think, to every person of ordinary prudence, that it would be extreme indiscretion in persons embarked in such a questionable commerce, to have the whole correspondence respecting it carried on, not immediately with themselves, but with the merchants in *Holland*, by their agent at *Batavia*. If any difficulty occurred, they, the neutrals, the real owners, were the persons to be consulted upon it. To see merchants in *Holland* interposed as a sort of middle men, or rather acting as the only *European* parties concerned, to see them conducting every part of the transaction, does unavoidably fix in the mind of the Court an impression, that this is a transaction connected with other interests, than such as are merely neutral; especially in a case that appears to have had its origin in *Holland*.

There are other papers which point still farther to some such complication of interests. At all events, it is a case of farther proof, as the master cannot speak in verification of the property. The only question, therefore, is, whether it is such a case, as can fairly be admitted to go to farther proof. The general rule of the Court is certainly this, that where there has been a suppression of an enemy's interest with a fraudulent view, the party engaged in that fraud shall not be permitted to supply the defects of proof, of his own property mixed up with it. It appears to be a rule perfectly reasonable in its principle, and one that this Court would find it necessary to support, even if the

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authority of the Superior Court, which has adopted it, had not made it absolutely binding upon its practice. The question is then a question of fact, whether there is reason to suppose that these parties entertained a fraudulent intention of withdrawing this man from the view of the Court? whether this concealment was done, in order to impart to him undue favour and protection, or from the more inoffensive causes suggested in the explanation? if I could be induced to believe it could be done from these suggested causes only, I should be unwilling to strain the rule of law, to the disadvantage of these claimants; although they are persons, who from many cases that have appeared in this Court, cannot think themselves entitled to more attention than the demands of justice strictly require: On the other side, if the explanations are not satisfactory, I must pronounce that the imputation of fraud is not removed; and the consequence will be, that under the rule which I have before stated, the parties cannot be allowed to sustain their interest by any farther elucidation.

In this amended claim, it was to be expected that some account would have been given as coming from the parties themselves, to explain how it happened that the original claim was framed in general terms.

[Dr. Arnold.—The parties were directed to amend the claim only; and it was apprehended that any explanation might have been considered as introducing farther proof.]

I cannot but think such an explanation might have been given, under the allowance of the Court to

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to amend the claim; as it now stands, it is merely the explanation of counsel. It is said however in explanation, first, that the claim is to be considered as given for *Black* and Co. and that the addition of "and Co." implies that other persons were interested in the adventure; and that it is not necessary to specify the several shares.---But can it be allowed, that if a neutral house of trade chooses to associate itself with an enemy, it is at liberty to cover his interests under a general claim so described?---That never can be permitted; for, under such a claim, the interest of every subject of the enemy might be protected. It is said farther, that although Mr. *Van Tromp* is, under the circumstances now appearing, in these papers, to be considered as a *Dutchman* by this Court; yet, in *Denmark*, he was considered as an adopted *Dane*; that therefore there could be no motive for dissimulation; and there being no motive for fraudulent concealment, no such concealment is to be imputed. Now, I am willing to say, that if in *any one paper*, - the name of *Van Tromp* had appeared, under the extreme disposition which I feel not to press the rule, where the facts will admit of an explanation that can justify a departure from it, I might accede to this reasoning; but, when I see, that it does not appear in *any one paper*, and that it comes out only accidentally at last, from papers introduced from other ships by the fortunate diligence of the captors; the fact of dissembling his interests must, I think, be subject to the imputation fixed upon it;---that it was done with a design of concealing his name from this Court, as a name that was not understood to be so clearly entitled to the rights of neutral

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DRY STORE.

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character, as it is pretended to have been in Denmark.

Again, if it could be shewn that the concealment had been introduced, only by the artifices of *Van Tromp*, although the principal is certainly in general to be held responsible for his agent, I should be unwilling to press the rigour of this rule, under such circumstances, against the neutral claimant; But how can this be understood? the original claim made no mention of such a person; or, if the original claim was incorrectly formed, under the original papers; how happened it, that no application was made to reform it as erroneous, till the secret had transpired from other quarters? On this view of the insufficiency of the explanation, and looking to the manner in which it is introduced, as the suggestion of counsel only, I am under the necessity of saying, that a fraudulent purpose does lie at the bottom of this transaction; and I am therefore under the necessity of rejecting the application for farther proof.

Arnold stated--That the agent in London was under some anxiety, lest blame might be imputed to him, for not giving the explanation, on the account of the widow *Black* and Co. with a specific declaration of their interests, as stated by them in a letter of 29th June, before the cause came on; He said that this had been omitted, owing to an apprehension that had been entertained, that the amended claim was only to state the specific interest; and therefore other points had been omitted, lest they might be thought to introduce farther proof, without being authorized so to do.

Court,--

Court.--I have not at this moment a very exact recollection of what passed, when the claim was ordered to be amended; but it having been agreed that the first claim was erroneous, I should not have thought the parties were wandering irregularly into farther proof, if they had gone on to explain, what circumstances had led to the inaccuracy of the former claim: I do not understand, that it is now asserted, that any notice was taken of Mr. *Van Tromp's* interest, or that the letters make this confession, before the *discovery had been made* of *Van Tromp's* interest; that being the case, it comes too late. The letters were not written till the 29th June,--before the hearing indeed, but not before it was perfectly apparent that *Van Tromp* had this interest--I think this is not sufficient to exculpate the party: it may perhaps operate elsewhere, if the parties should incline, as they probably will, in a question of such extent in point of value, to resort to other judgments; but it is not sufficient to induce me to alter the decree. It must be recollected that the decree is founded, not on this circumstance alone, but upon a view, collecting around it, all other eircumstances of suspicion, with which the case abounds.

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public certificate on any such representation, for a cargo of this nature, going direct to *Batavia*, there to be sold, is a gross fraud, productive of the worst consequences; for by these means such articles are carried to the enemy with perfect security, and without a possibility of interruption, which ought not to be carried at all. This is a conduct to be marked by *Danes* as well as by this country, *nigerrimo lapillo*; it violates the faith of treaties, and weakens the confidence of nations.

But it is said, this is a past transaction, and that in cases of contraband, the returned voyage has not usually been deemed connected with the outward: In *European* voyages of no great extent, where the master goes out on one adventure, and receives, at his delivering ports, new instructions and farther orders, in consequence of advice obtained of the state of the markets, and other contingent circumstances, that rule has prevailed; but I do not think that in distant voyages to the *East Indies*, conducted in the manner this has been, the same rule is fit to be applied. In such a transaction, the different parts are not to be considered as two voyages, but as one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions, *ab ovo usque et ad mala*. The whole of it is termed by the parties themselves, in these very papers, *the expedition*, in which the returns are essentially connected with the outward cargo, and all considered as composing one adventure. Shall I then, viewing the matter in this light, separate for the benefit of such parties as these, that which they have joined together? Shall I say, that this returned cargo is

so

so unconnected with the original shipment from Europe, as to receive no taint of discredit; from the manner in which the parties have conducted themselves in the whole of the outward voyage. Till I am better instructed, I shall hold, that parties setting out on such an expedition with ill faith, and pursuing that measure of ill faith up to its consummation, in the delivery of the outward cargo, are implicated in the consequences of such a conduct, throughout the whole sequel of that transaction. I shall therefore reject the claim as to the cargo, on the ground, that these parties have, by their original *mala fides*, forfeited their fair pretensions to be admitted to any farther proof.

As to the ship, it is impossible not to see that a great deal of management has been used about that also; the master knows nothing about her--the previous history is all studiously concealed; I have often had occasion to remark, that where a master will not hazard a conjecture about the built and history of his ship, it is a modesty that is not without its meaning: Perhaps it might be better if a few more interrogatories were addressed to masters on this point: Two more might be very useful, as, How long has the present owner been in possession? and, of whom purchased? In this case there is a studied suppression of the former history by some person or other: The master is a person sent from *Holland*; he has either been kept in ignorance, or wilfully suppresses what he knows--the papers in the outward voyage are vitiated, and the destination has been grossly misrepresented. If I was disposed to pursue the strict principle, the ship might be involved in the same sentence
which

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NANCY.

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which I have pronounced against the cargo—I will not do that at present, neither will I order farther proof; but I will do what I consider myself authorized to do, I will order the original bill of sale to be produced.

July 4th,
1800.

THE CERES, SHEW Master.

Commission for examination of witnesses runs jointly and severally—A second commission granted, on a suggestion that one commissioner being absent, the other had not thought himself at liberty to proceed alone.

In this case an application was made to the Court to issue a new commission for the examination of witnesses, on a suggestion, that the former commissioners had not executed their office; that one commissioner had absented himself, and the other had declined to act alone.

Court.—What is the usual practice in these cases, if one of the commissioners does not attend?

Registrar.—Notice is given to both commissioners; and if one absents himself after that notice, the other is at liberty to proceed alone. The powers under the commission are given jointly and severally.

Court.—I shall grant a new commission in this case; but solely upon the ground of Mr. —————'s refusal to proceed; and I direct it to be made returnable within a month.

THE DER MOHR, HELMER Master.

June 24th,
1800.

THIS was a case of a ship and cargo taken 10th Sept. 1799, on a voyage from *Surinam* to *Altona*, but lost in coming through the *Needles*, owing to the ignorance and wilfulness of the prize-master put on board. The cause now came on, upon the claim of the owner of the ship, for *restitution in value*.

Prize ship lost
by the miscon-
duct of the
prize master—
restitution in
value.

For the claimant, Swabey and Robinson stated the circumstances attending the loss, from the protest of the master, and the evidence of a passenger in the ship, and contended, that it being a clear case of restitution as to the ship, and the loss having been occasioned, by the gross negligence of the agents of *those*, who took possession, merely for the purpose of bringing the cargo to adjudication; the principal captors were responsible to the owner for the value of the ship; the case of the *Henrich* and *Jacob* was relied on, in which the captor had been held responsible for a loss happening even in the hands of the enemy, who had taken it out of his possession.

¹Adm. Rep.
p. 97.

For the captor, the King's Advocate and Arnold—prayed that they might be permitted to introduce farther evidence, and that the Court would be disposed to shew every indulgence in a case like the present; in which, it was only under a very rigid principle of law, that the captor could be held responsible for acts, which took place when he was not personally in possession.

The
Decr. MORN.
June 24th,
1860.

Court.---It is a principle of law undoubtedly, that may operate with great rigour in particular cases; but it is one that the Court cannot depart from, in any degree, that the principal must be responsible for the acts of his agent.---Case directed to stand over.

24th July.

JUDGMENT.

Sir W. Scott.---This is certainly a very calamitous case--either to the neutral, whose property is destroyed; or to the officers of His Majesty's ship, the *Captor*, if they are to answer for the loss which has been sustained, out of their own private funds: What makes it more calamitous is, that the parties themselves, on both sides, appear to be entirely free from every imputation of blame; nothing could be more correct and meritorious than the conduct of the captors; at the same time it is a principle too clear to be doubted, and too stubborn to be bent, that every principal, is civilly answerable for the conduct of his agent. The original seizure was made on grounds which the Court has held to be justifiable; and the conduct of the parties themselves was perfectly unexceptionable; but under the principle that I have stated, the result of this application will depend on the manner in which their agent conducted himself, if the loss is immediately attributable to him.

It appears that the capture was made by two of His Majesty's ships; that the senior officer captain *Church* committed the prize to the care of captain *Talbot*, directing him to put a pilot on board, for the purpose of taking her through the *Needles*, and to accompany her to *Spithead*. These orders were

most

most correctly obeyed by captain *Talbot*; a pilot came up, and was sent on to the prize, which was at some small distance behind: Indeed it was not likely, that it should be neglected, as captain *Talbot's* own vessel, had herself been in some danger, in getting through that passage. These gentlemen appear to have done every thing, that could be done on their part, to exonerate them from this demand; but let us see how their inferior officer has conducted himself--The prize-master admits that a pilot came down, and tendered himself as sent by one of the commanders to take charge of the vessel: The prize-master refused to admit him, but he insists, "that the loss happened owing to the sudden shifting of the wind, and that no skill could have prevented it." What is the account given by the neutral master, and the passengers on board? They say, "that the pilot came and told the prize-master, that he was sent to take charge of the ship, but the prize-master declined to admit him, asserting that he was himself a pilot for the *Needles*, and wanted no assistance." How was he a pilot for the *Needles*? He was not, I presume, a licensed pilot for that navigation; he might be a good seaman, and equal to have taken the charge of the ship at sea, in an ordinary state of weather; but *that* will not be sufficient. It is clear that the captains of His Majesty's ships entertained a different opinion of his competency, for they directed a pilot to be taken on board; and if a pilot was to be had, he could not excuse himself for refusing to take his assistance. It is farther stated, that the neutral master, who knew this passage very well, warned him to brace his yards sharper, but he refused. Is it

The
Dra. Mor.

June 24th,
1800.

The
Dear Master,
June 24th,
1869.

possible to see any thing in this conduct but ignorance and obstinacy united? This account of the neutral master is fully confirmed by the affidavit (a) of a passenger on board, the widow of a *British* officer; she says, "that the prize-master refused to take the pilot on board, or to give the neutral master the management of the vessel, though he was repeatedly warned of his danger, and that she believes the vessel was lost through *his* want of skill, &c." These facts have not been in any manner denied, although ample time has been given to contradict them. Under these circumstances, it is impossible for me to say otherwise, than that the ship was lost by the misconduct of the prize-master. It is undoubtedly a case of calamity, *miseranda vel hosti*--to be lamented by the claimant himself, if he considers himself as the enemy of his captors; but it is impossible for me to steer clear of the rule of law, that a principal is civilly answerable for the conduct of his agent. I am under the necessity of pronouncing the neutral owner entitled to his property, and must direct restitution to be made in value of the ship.

With respect to the cargo, that is claimed for another person, a merchant of *Hamburg*; that may stand on other grounds; there appears to have been no cause of seizure of the ship, but for the purpose of bringing in the cargo, which was a cargo of *West India* produce going from the colony of the enemy; I should certainly hold there was justifiable cause of seizure as to the cargo, and as that may rest on other grounds, I shall direct that to stand over.

(a) Affidavit of Mrs. Busch.

THE AURORA, THOMPSON Master.
 (Instance Court.)

June 28th,
 1800.

THIS was a case on petition to supersede a warrant, issued to arrest the ship, in a cause of possession.

Case of possession, title of property not sufficiently clear to sustain the action--- Warrant superseded.

Against the warrant, Swabey.---This is a proceeding to arrest a ship, under an apprehension that the master would sail away with her, unless prevented by the authority of this Court; it is a form of action very simple in its nature, and well adapted to afford a speedy remedy, between *an owner and his servant*. But where a question of property is concerned, whatever may formerly have been the power of this Court, it has long ceded that jurisdiction to other Courts, and will not entertain a question of property, unless incidentally arising. The facts of this case are, that the action is brought by Mr. Whitmore as agent for Russel and Co. setting forth, "that Russel and Co. are the holders of the bill of sale :" That is not sufficient. A bill of sale alone, without possession, is not held to be a sufficient title against the assignees of the vendor in cases of bankruptcy, if there are means of taking possession, as in this case there undoubtedly were.---A person bringing this action must shew a clear *constat* of property. The warrant proceeds on an assumption, that Thomson retains possession, in the capacity of master; but the fact is otherwise : Thomson sailed from this kingdom as master and owner ; he continued in possession in that character till he became a bankrupt, and then the messenger of the assignees took possession. The assignees are the persons now in possession, and they declare themselves ready to try the title in another Court.

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AURORA.

June 28th,
1809.

Would the Court take the ship out of the hands of the messenger of another Court? certainly not. It is a suit brought in its present form by improper persons, and against improper parties, and on an instrument that can hardly be called a bill of sale; or if it were, when there were means of taking actual possession, that alone would not be a *constat* of property, sufficient to induce the Court to proceed upon it, as in a case of possession.

[*Court.*--I know it is held so in Chancery: But are there any cases in which the Court of Admiralty has held it to be necessary, to follow up a bottomry bond by immediate possession?]

Swabey.--This is not strictly an hypothecation bond; by the instrument the master does not bind the ship, but himself and his executors, engaging to ratify a bill of sale on his arrival in *England*; till that time *Russel* and Co. rest on the personal security of the other contracting party; it cannot be considered as an hypothecation bond.

On the other side, the King's Advocate and Lawrence.--The title under which possession of the vessel is claimed, is an assignment made to foreign merchants by the master, being also the owner of the ship. The object of the contract, appears on the face of it, to have been, to give the person lending money for the purposes of the ship, a lien on it; and for that purpose an assignment was made of the real title; if the money advanced was less than the real value, it will, to that amount, still operate as a lien on the vessel, subject to an equity of redemption, on the part of the original owner, or of those claiming under him. The value of the consideration

consideration cannot be made a ground to vacate the substance of the obligation. The contracts of masters made in foreign countries, for the necessities of their vessels, are highly beneficial to the interests of commerce, and as such, are strongly supported by Courts of Law ; this being one of those contracts, the parties are entitled to the aid of the Court, to carry the assignment into effect.

The
Aurora.

June 28th,
1800.

JUDGMENT.

Sir JV. Scott.—This is the case of a vessel against which a warrant was granted at the application of a respectable merchant of this town, Mr. *Whitmore*, describing himself to be the agent of *Russel* and Co. merchants of *Lisbon*. Whether these gentlemen are *English* merchants or not, does not exactly appear, though I have very little doubt they are *British* subjects. However, I will consider the transaction with reference to both those characters. The affidavit of Mr. *Whitmore* states, “That he is the agent and correspondent of Messrs. *Russel* and Co. of *Lisbon*; that he has been informed that *J. Thomson* master and owner of the ship *Aurora* is largely indebted to Messrs. *Russel* and Co. of *Lisbon*, for monies advanced for the use of the said ship.” A good deal has been said of the assistance which this Court is desirous of giving to maritime contracts made abroad for the service of the ship, under circumstances of pressing necessity.—But neither in this bond, nor in the account given in the affidavit, is there any mention made of any of those circumstances, which induce the Court to uphold, with so high a hand, the validity of contracts made under situations of difficulty and distress. The affidavit goes on to state, “that as a security for the said

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1800.

laws. They may therefore appear in this case as *British* merchants; and if they are to be considered in that character, nobody can say, that this is a valid title-deed of a vessel, as between *British* merchants. The former owner is left in possession; the ship sails under her former register, and the contract appears to be only executory, and dependant upon the personal faith and credit of the party. I think it is more than this Court will take upon itself to pronounce, that this is a clear and absolute conveyance between *British* subjects (*a*).

But it is argued that they are to be considered as foreigners—Of this no proof is given: Their names, and the circumstance of their residence, create a probability that they are *British* subjects—But supposing them to be *Portuguese* subjects, can I consider this instrument to be a good and valid bill of sale, transferring the title of this vessel to them, if it still continued to navigate as a *British* vessel, under a *British* title, and a *British* register? If they are to be considered as foreigners, there would be, in this proceeding, a fraud committed on the *British* navigation act; to which this Court would certainly not lend its countenance. She ought to have been converted into a *Portuguese* vessel, and documented as such.—Then in what character can I consider these persons as being in possession of this vessel, as the real and undoubted owners? As *British* subjects, they could not rely

(*a*) 26 Geo. 3. c. 60, s. 17. In the transfer of any ship belonging to *British* subjects, to other *British* subjects, in whole or in part, the certificate of the registry must be recited accurately and at length, otherwise such bill of sale shall be null and void.—There was no mention of the register in the preceding bill of sale.

on this instrument, as a clear indisputable conveyance according to our law: as foreigners, claiming the property of this vessel continued in the *British* trade, and in a *British* name, they are chargeable with fraud. Does not this dilemma strongly point out the nature of the contract, and mark it to be only a sort of collateral security, intended to operate till the assignment of the vessel could be made absolute to them? It is at present not an actual assignment, but a security for a debt, a disputable, or an incomplete, and inchoate title, the validity of which, the assignees under the bankruptcy express themselves willing to try, in a proper Court. It is fit that it should be tried in the Court of Chancery, where the general interests of this man's estate are at present under litigation. The present action being to dispossess the master, at the suit of an owner, it is impossible for me to say that there is a sufficient *constat* of property for that purpose established; I am therefore disposed to supersede the warrant.—Warrant superseded.

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AURORA.
June 28th,
1800.

THE DAIFJIE, SOARING, &c.

July 8th,
1800.

THIS was a question arising on two *Dutch* ships, taken 7th May 1800, on a voyage from the *Texel* to *Flushing*; and claimed, as being under the protection of a cartel, going to *Flushing*, for the purpose of taking on board some exchanged prisoners, to convey them to *England*.

Cartel ships
going from the
Texel to *Flushing*,
to take ex-
changed pri-
soners on board
to bring them
to *England*,
Restored.

The extent of
the protection
of cartel, how
considered.

JUDGMENT.

Sir W. Scott.—These are two *Dutch* vessels, captured on the 7th May, and claimed as cartel ships:

The

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1800.

The question is, whether from the circumstances under which they were taken, they are to be considered under the protection of that character or not. It is a practice (*a*) of no very ancient introduction among the states of *Europe*, to exchange prisoners of war in this manner; it has succeeded to the older practice of ransoming, which succeeded to the still more ancient practice of killing, or carrying them into captivity—I say it is a practice of no remote antiquity, because, on looking into *Grotius*, I find not a word of exchange, in the sense in which we are now speaking of it.—It is a practice, therefore, which, at least as far as his writings seem to indicate, was not of very familiar and general use in his time, though perhaps not altogether unknown: it is however of a nature highly deserving of every favourable consideration, upon the same principles as are all other *commercialia belli*, by which the violence of war may be allayed, as far as is consistent with its purposes; and by which, something of a pacific intercourse may be kept up, which, in time, may lead to an adjustment of differences, and end ultimately in peace. At the same time, it is highly proper, that it should be conducted with very delicate honour on both sides; so as to leave no ground of suspicion, that a practice introduced for the common benefit of mankind, should be made a stratagem of war, or become liable to fraudulent abuse: I presume the terms of cartel, are usually settled by agreement between the two states; in the present instance, we are not informed what those terms of agreement are; if they

(a) For some observations, on the *probable* period, when this practice began to assume a regular form, amongst the states of *Europe*—see Appendix A.

appeared,

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1800,

appeared, there might perhaps be no question left; perhaps the very letter of it might decide the present case; or, supposing it not to be within the letter, it might still be within the spirit of the agreement, liberally construed. Judging, without such information, and on general principles, I must lay it down as clear, that ships are to be protected in this office, *ad eundem et redeundem*, both in carrying prisoners, and returning from that service---Whether there is any stipulation usually made, as to the species of ships to be employed, does not appear; I should rather understand from the return made by the transport board, that there is not any stipulation on this point; and perhaps it may be immaterial, whether they are merchant ships, or ships of war, that are so employed---It may indeed be possible to put an extreme case, in which the nature of the ship might be material; as, if a fire-ship was sent on such service to *Portsmouth* or *Plymouth*; though she had prisoners on board, she would undoubtedly be an unwelcome visitor to a naval arsenal, and her particular character might fairly justify a refusal to admit her; but, in general, the nature of the vessel does not appear to be of consequence.

A particular circumstance in this case is, that these vessels were not actually employed as cartel ships, nor taken *in trajectu* either way, either going, or returning, between the ports of the two belligerents; they were not in the actual discharge of those functions, which would entitle them to protection *eundo et redeundo*, for they were going from the *Texel* to *Flushing*, there, as they say, to take the prisoners on board. It is the employment, and not the future intention, that protects; they ask protection therefore beyond the reach of the strict principle,

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principle, which allows it only *cundo* and *redeundo*. I think however that the protection may be not improperly extended, if it appears that they had in any manner entered upon their functions, by being put into a state of actual preparation, and equipment for their employment. Suppose that such ships had been found in the *Tervel* last year, upon our expedition into *Holland*, actually *fitted* up for this use, and by being so *fitted*, *unfitted* for other uses; I think they would have claimed a favourable consideration, although they had not a prisoner on board. The passage of ships from one of their own ports to another is liable to more suspicion. If the protection of cartel were universally allowed in such cases, it would give the enemy the means of concentrating his force without molestation—It is said, that this is a subject, on which suspicions are not to be indulged, and that the strictest delicacy is to be observed on both sides—but such an employment of a vessel does in some degree necessarily beget suspicion; and the best way to avoid suspicion is to do nothing that excites it. If it is said that such a voyage as this, between the ports of *Holland* is to be allowed, under the privileges of cartel, where are you to stop? I am informed, a case has occurred, in which an attempt was made by this very *Dutch* government, to get home their ships from *Norway*, under a pretence of this same nature—may vessels be brought under this pretence from the *East Indies*? or where can the line be drawn? It is said that it was absolutely necessary, and that necessity justifies itself—but no such necessity is shewn; it is hardly possible that there could have been any difficulty in finding shipping

at

The
DAFFIE, &c.

July 6th,
1100.

at *Flushing*—necessity being out of the case, I will venture to lay it down, that a ship *going to* be employed as a cartel ship, is not protected by mere intention, on her way from one port to another of her own country, for the purpose of taking on herself that character, when she arrives at the latter port. In some cases perhaps, such a necessity may occur; but then what is the measure to be pursued? it is usual, in such cases, and it is proper, to apply to the commissary of prisoners residing in the country of the enemy, and to obtain a pass from him. From this practice alone we may infer, that it is not the employment, that is held to convey a necessary protection in these cases; but that the security is derived from the *special safe conduct*, which would be unnecessary, if the mere service were sufficient.—It is a precaution most reasonable, that such a safe conduct should be obtained; and I cannot consider it, as depending on any particular adherence to form, on the part of this country, nor as being peculiar to our government, in any manner, to expect, that such a caution should be observed.

At the same time, if these ships were going in perfect good faith on this service, and had ventured out to sea, under a reliance of being protected by the nature of their service, though it must be considered to be a rash step, it would be too strict, to hold them liable to the penalty of confiscation. The question, therefore, resolves itself into a question of fact; whether there was on the part of those intrusted with the management of this business, an honest persuasion, that in going to *Flushing* on this service, they should be protected? If so, I should not be disposed to hold them liable to the

penalty

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DAIPIE, &c.

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penalty of confiscation. Then what are the particular circumstances of their situation? They have instructions on board from their own government, and they had an *English* ensign hoisted, when they were addressed: so far they appear clothed with the usual marks of cartel ships; though the latter circumstance does not weigh much. The objections that have been taken are, that they did not communicate with the adverse government, to give notice, that these ships were to be so employed. This, I have said, might be a rash and imprudent negligence on their part, but it is not decisive against them, to shew that they were acting fraudulently. It is besides stated to me, that there is no *English* commissary residing in *Holland*, which takes off, in some degree, from the force of this objection. It is farther urged, that notice was not sent to their own agent here, till after the capture, and, perhaps, till after the knowledge of it. The capture was made on the 7th of *May*; the first letter that was written to him, is of the 9th of *May*, and the 2d of the 10th, both reaching him at the same time--but perhaps it was not thought necessary to write to him, till the vessels were actually dispatched, when the functions of his office were to begin. It is said, the size of the vessels is disproportionate to their employment, and that they were larger than such service required; but one is an *old East Indiaman*, which had been lying some time in the *Texel*; and it is to be observed, that the persons employed to navigate her, were taken out of the military hospital, and might, on account of their health, require more than ordinary accommodation. It is to be considered also, that prisoners

prisoners were to be brought back, and therefore perhaps the size might not be ill adapted to all these circumstances. Again, it is objected, that they had a quantity of shot on board--but, as I understand, for the purpose of ballast only : The quantity is not large, not more than 12 tons out of 150 ; and it cannot be conceived, that such an article might not be carried as conveniently, for any sinister purpose, from the *Tervel* to *Flushing*, by their own inland navigation ; as to the manner of stowing them, in sand and gravel among the ballast, it is, I presume, the usual way of stowing such articles, when they are not fastened down with cramps. It is said, the persons on board did not conduct themselves conformably to their instructions, they however appear to have done so sufficiently; or at least if there was nothing indicative of a hostile intention, I should not be disposed to draw an unfavourable conclusion, from slight circumstances of behaviour. It is said, they had not their *English* colours flying--but they hoisted them on being addressed ; it is said also, that they did not stop on the enquiry of our cutter, to give an account of themselves--This again was an imprudence, as it might, perhaps have prevented all this difficulty ; but I do not think it amounts to any thing more. These are the principal circumstances on which objections are raised, to shew that they were not acting in a *bond fide* pursuit of the cartel character and office. There are, I think, on the other side, circumstances indicating a fair and honest intention. The quality of the ships is something; they appear to have been old *East Indiamen*, which had been laid up, and might be extremely

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DAFFIE, &c.

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1800,

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1800.

fit for this service, and for hardly any other. In the next place, they were in some degree of preparation, and therefore entitled to the benefit of the principle, which I have thrown out on that point. Every gun was taken out; they shewed no measure of offensive operations to the little *English* vessel that was hovering about them. I do not observe that it has been stated in argument that any particular view of hostility was to be answered by their repairing to *Flushing*. The officers on board positively swear, "they were going as cartel ships." They must either be affected with ignorance or wilful fraud; credit must be given to their representations. The character of enemy does certainly admit of stratagem and artifice to a certain extent, yet not upon such occasions as these; on such occasions the most scrupulous attention to good faith has always been observed by the old governments of *Europe*, agreeably to the system on which the affairs of *Europe* have been happily conducted for a great length of time. There are indeed new governments, that have omitted no opportunity of expressing themselves adversely to all rules on which the old system has been founded; and it may be doubtful, how far they are disposed to conform in practice to those ancient principles: But they shall have an example at least to shew them, that the ancient governments still adhere, with the most delicate attention, to all the principles on which the public affairs of *Europe* have hitherto been managed: They shall see, that it is their interest to respect that system, whatever views they may have had in affecting to treat it with indignity and contempt.

These

These are the considerations on which I shall direct these vessels to be restored; at the same time I must say, that there has been much rashness and imprudence. The whole of the trouble and expence of these proceedings, has been occasioned by the irregularity of their conduct. It is but fit that this expence should fall upon them; therefore I restore these vessels, subject to the payment of the expences of this suit.

The
DAFFIE, &c.

July 8th,
1800.

THE JUFFROW MARIA SCHROEDER,
GREENWOLD Master.

July 13th,
1800.

THIS was a case of a *Prussian* vessel, taken 14th June 1799, on a voyage from *Rouen* to *Altona*, and proceeded against, for a breach of the blockade of *Havre*. On a former hearing it had been contended on the part of the claimant, that the blockade was to be considered as relaxed; and an application was directed to be made to the Admiralty for information respecting the continuance of the blockade of *Havre*. A certificate was now produced from the Admiralty in these words: "Certifying to the Right Honourable Sir *William Scott*, Judge of the High Court of Admiralty of *England*, that the port of *Havre de Grace* in *France*, and the other ports of the *Seine*, were ordered to be blockaded by His Majesty's ships on the 28th of *February* 1798; and that such blockade has not since that time been raised or relaxed by any orders from the Right Honourable the Lords Commissioners of the Admiralty, to His Majesty's cruisers; but the said

Blockade of
Havre—Plea of
remissness in
the blockade
force, how far
available ships
permitted to go
in, or out, and
taken after-
wards in a sub-
sequent part of
their voyage.

The
JURPROW
MARIA
SCHBOEDER.

port has been, and still continues to be in a state of blockade. July 4th, 1800."

15th,
10.

On the part of the claimant, Laurence.--This is one of a class of cases in which the Court has directed an enquiry to be made respecting the manner in which the blockade of *Havre* has been kept up. From the facts that now appear, and the general principles of law applying to them, it is evident that no blockade can be considered to have existed against these vessels; and consequently that the penalty usually inflicted on the breach of a blockade, can in no way attach on them. To constitute the legal effect of a blockade, two things are held to be necessary: that an actual blockade shall exist, and that some notification shall be given of it, either by public declaration to foreign states, or by notice and warning to the individual ship charged with breaking it: of these the actual blockade is the most essential; since without that a notification avails nothing, as it has been held by the Lords of Appeal in the case of the proclamations issued by our commanders in the *West Indies*, and published afterwards by our minister in *America*. It may be laid down as a fundamental principle, that it is necessary some actual blockade should exist; and that a notification is not, of itself, sufficient to raise the presumption of a blockade-- Much less can this effect be attributed to such a notification as the present, confined in its terms to a particular object, and prospective in its operation; as it now appears, that although the public declaration was made on the 23d *February*, no orders were given to our cruisers for carrying it into execution till

till the 28th. The object of this blockade being confined to the purpose of preventing the invasion, with which this kingdom was then threatened (*a*); there is no reason to suppose, that it was intended to be continued, longer than the particular reason existed. So soon as November 1798, we learn from so great an authority as Lord *Duncan*, in the case of the *Neptunus, Hempel*, (2d Adm. Rep. p. 110.) that no blockade of *Havre* was known to the navy to be then existing; from that period through the spring and summer of 1799, vessels are invariably permitted to pass in and out. Many vessels were

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SCHROEDER.

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(*a*) The undersigned Secretary of State of His Britannic Majesty has received His Majesty's commands to acquaint Mr. *King*, Minister Plenipotentiary of the United States of *America*, that the King, apprized of the preparations which are making at *Havre de Grace* for the invasion of these kingdoms, has judged it expedient to avail himself of the superiority of his naval forces without delay, for the defence of his dominions, and the protection of his subjects; and for this purpose to establish the most rigorous blockade at the entrance of that port, and the other ports of the *Seine*, and to maintain and enforce the same in the strictest manner, according to the usages of war acknowledged and observed in similar cases.

Mr. *King* is therefore requested to apprise the *American* consuls and merchants residing in *England*, that the above-mentioned ports are, and must be considered as being in a state of blockade; and that from this time no neutral vessel can be suffered to enter them upon any consideration, or under any pretence whatsoever; and that all the measures authorized by the law of nations, and the respective treaties between His Majesty and the different neutral powers, will henceforth be adopted and executed with respect to vessels destined for the said ports, or such as shall attempt to enter them after this notice.

(Signed) GRENVILLE.

Downing-Street,
23d February 1798.

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stopped

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JUVENIA
MARIA
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stopped and examined as to the property of the cargo, and the destination, and on other points; but no objection appears to have been taken on the ground of blockade; some were proceeded against on other grounds, and others were released. The present ship went in in *May* 1799, having been met by the *Stag* frigate, and suffered to pass unmolested; she came out again on the 14th of *June*, and saw no ship for 48 hours, and was seized at last off the *North Foreland*, by the *Camperdown* cutter---the circumstances attending the capture all shewing, that the ground of seizure was not in any way connected with the blockade. In the latter end of *June*, and in the beginning of *July*, the *Vrouw Barbara* was suffered to go in, and to come out of *Havre*; and was seized off the *North Foreland* by the *Harpy*. On the 21st *June*, the *Thuisken* coming out of *Havre* was boarded, and carried to the commanding ship of the station, the *Penelope*, where, after being examined she was released, and her discharge was endorsed on the papers; she was afterwards taken in the prosecution of her voyage, off the *Lizard*. On the 11th *July* 1799, the *Henricus* was stopped going in by an *English* cutter, and released; afterwards the *Duchess of York* frigate coming down, examined her, and let her go in; but on the 8th of *September*, as she was coming out, the same frigate seized and detained her. In the intermediate time between these periods, it is to be observed, fresh orders were received from the Admiralty---the captors have produced orders given by the Lords of the Admiralty on the 17th *August* to the captain of the *Atalanta*, directing him "to take the *Beaver* under his command, and proceed

as expeditiously as possible off *Havre*, there to take under his command the ships he should find on that station, for the purpose of blocking up the coast, and watching the motion of the enemy, and protecting the island of *St. Marcou*, till farther orders." These orders are perfectly consistent with the construction, that had been put upon the former notification, as not interfering with the free passage of neutral vessels; and so they appear to have been considered by this gentleman; for in another exhibit that has been introduced in the *Henricus*, (the affidavit of the commander of the *Atalanta*, stating the substance of his correspondence with Mr. *Nepean*), it appears he informed Mr. *Nepean*, "that he had examined a ship going in, and suffered her to pass, &c." as an ordinary occurrence--The date of that letter is of the 13th *September*; about that time it was, that an enquiry was directed to be made by this Court--After the question had been mooted here, a different conduct seems to have been pursued; on 27th Sept. Mr. *Nepean* writes to this officer in these terms--" I have the command of the Lords Commissioners of the Admiralty to inform you, that you are not to permit any vessel whatever to enter *Havre*." This is to be considered as the first declaration since Nov. 1798, that *Havre* was considered to be under a mercantile blockade; the first notification did not import it; the conduct of the forces employed on that station expressly contradicts it.--Till the 10th of October 1799, after the receipt of these latter orders, no instance occurs in which any one witness said, he was stopped on account of the blockade; since that period there is no instance in which

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the witnesses do not give that reason for their detention; till *August*, when something like a renewal issued, the blockade is to be considered as totally relaxed; which alone by the law of nations is held to operate as a legal *cessation*. *Bynkershoeck*, reasoning on the pretensions and practice of his own country, says---That a blockade is virtually relaxed, “*Si segnius oræ observatæ fuerint.*”

In this case, where the original motive of the blockade was to prevent invasion; when that danger had ceased, a general remission of the actual blockade, is still more naturally to be considered as a final cessation: That being the case, the effect of the blockade cannot be renewed without some declaratory act; vessels seized during the period of relaxation, on other grounds, and after having been released on all enquiry connected with the blockade, are not to be dragged back into the penalty of that offence, when nothing is produced but a negative declaration of the government, which states, *not* that there *was no actual relaxation*, but that they had issued no orders to that effect. The fact of an actual remission as to these vessels, is fully proved; and that alone is sufficient to discharge them from the offence and penalty.

JUDGMENT.

Sir W. Scott.—This is the case of a ship taken on a voyage from *Havre* to *Altona*; all the papers express that the ship came from *Havre*, and there is no dissimulation of that circumstance: The master on his examination says, “that he does not know for what reason he was taken;” but it is not necessary that the captor should have assigned any reason.

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JUPPROW.
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reason at the time of capture; he takes it at his own peril, and on his own responsibility, to answer in costs and damages, for any wrongful exercise of the rights of capture.—At the same time it may be a matter of convenience, that some declaration should be made; because it is possible, that if the grounds are stated, it may be in the power of the neutral master, to give such reasons, as may explain away the suspicion that is suggested. It may therefore be convenient to both parties, but it is not absolutely necessary; it is not a duty incumbent on the captor to state his reasons; much less it is to be argued negatively, that because no mention was made of the blockade, at the time of capture, it must necessarily have been unknown to both the parties.

In the depositions, the neutral master swears very positively to his own ignorance of the fact of blockade, and states in a very ingenuous manner the course of his late voyages, "that he had been from *Memel* to *Sandwich*, that he sailed from thence for *Emden*, but was prevented by winds, and went to *Bourdeaux*, from thence to *Havre*, and was now proceeding from *Havre* to *Altona*, having never broken a blockade, nor received any notification;" and in this account he is supported by another witness.—However, the fact turned out to be, and the captors had a perfect right to avail themselves of it, that *Havre* was in a state of blockade; and though this vessel had passed the blockading force, and was taken by a cruiser not employed on that service: yet, it has been held by the Court (*a*), that where a ship has contracted the guilt by sailing with an intention of entering a blockaded port, or by

(*a*) Adm. Reg.
p. 114 & 130.

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by sailing out; the offence is not purged away till the end of the voyage; till that period is completed, it is competent to any cruisers to seize and proceed against her for that offence. If therefore the fact is proved, that the ship had violated a blockade, there can be no doubt but that this cutter will be entitled to the benefit of it against her.

It is perfectly clear, that a blockade had taken place some months before; and that the notification was communicated to the claimant's government, not only, that a blockade would be imposed, *but of a most rigorous kind*. A blockade may be more or less rigorous, either for the single purpose of watching the military operations of the enemy, and preventing the egress of their fleet, as at *Cadiz*; or on a more extended scale, to cut off all access of neutral vessels to that interdicted place; which is strictly and properly a blockade, for the other is in truth no blockade at all, as far as neutrals are concerned. It is an undoubted right of belligerents to impose such a blockade, though a severe right, and as such not to be extended by construction; it may operate as a grievance on neutrals, but it is one to which, by the law of nations, they are bound to submit: Being however a right of a severe nature, it is not to be aggravated by mere construction.

The notification in this instance declared, that the blockade was to be of the most rigorous kind: The *Seine* was to be perfectly sealed up; no ingress or egress was to be allowed; the blockade was to be as complete as the blockading force could make it. This was the tenor of the notification given to foreign governments; and I cannot entertain the least doubt, that the orders which were given to our

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our Admiralty, were conformable to it. It is impossible to suppose, that the orders for carrying into effect a great measure, so materially affecting other states, would not be given by government with the utmost exactness. When such measures are imposed it might be a matter of convenience, if some notification was given to this Court, which is ultimately to decide, on the consequences resulting from it---It might be desirable also, that our fleets in other stations should be apprized of it; but these are considerations of convenience and practice, no way interfering with the effect of the notification that has been made, and the means that have been taken, to carry it into execution. It is impossible to suppose that the communication, so made by the government to the Board of Admiralty, was not acted upon by the Admiralty with equal exactness; no one who knows the manner in which that Board has at all times been conducted can doubt, that the orders for carrying such a measure into effect were framed and delivered to our cruizers on that station, with the utmost dispatch and precision.—This fact I will venture to assume, that orders must have been given to these cruizers in the most regular manner; yet I cannot shut my eyes to a fact that presses upon the Court, that the blockade *has not been* duly carried into effect: A temporary and forced secession of the blockading force, from the accidents of winds and storms, would not be sufficient to constitute a legal relaxation: but here, ships are *stopped* and *examined*, and suffered to go in. The master of this particular vessel says, "that in coming out he saw no ships for 48 hours;" that might be accidental, but when he entered, they

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they were on the station, yet no attempt was made to prevent him from going in : No contradiction is opposed to this account, though I have no doubt that a proper application has been made to the King's ships concerned. In other cases also, it appears that no force was applied, for the purpose of enforcing the blockade: The same permission was given to go in--How this happened I cannot divine, for I find the orders of the Admiralty of the 27th August 1799 were, "to block up the port of *Havre*," and these seem to connect themselves with the former orders: There is besides a letter from Mr. Nepean to captain *Griffiths*, in answer to a letter stating, "that the *Fly* had examined a snow, and suffered her to go in," in which Mr. Nepean writes, "I am commanded to acquaint you that you are not to suffer any vessel to enter, &c." --There can be no doubt then of the intention of the Admiralty, that neutral ships *should not* be permitted to go in; but the fact is, that it was not in every instance carried into effect.

What is a blockade, but to prevent access by force? If the ships stationed on the spot to keep up the blockade will not use their force for that purpose, it is impossible for a court of justice to say, there was a blockade actually existing at that time, so as to bind this vessel.--Then, the only ground, on which she could be effected, would be, that the whole voyage was criminal, from the time of sailing from *Bourdeaux*, without any reference to the conduct of the blockading force. In opposition to that, I am to consider, that the ship was not coming from her own port; she had been some time absent from her own country; she had been in

in our ports, where it is possible, the notification might not have reached her; she afterwards went to *Bourdeau*: During the time necessarily employed in two such voyages, if the master had been accidentally informed of the blockade before, it would be a little hard to say that he might not entertain a conjecture, that the blockade had ceased: I fear that alone would not avail him; but coupling it with the fact, that no force appeared to prevent him from going in, it would be a little rigorous to bind down the strict principle of law on him: I think these circumstances bring the case within the principle of the *Neptunus* (a), *Hempel*, ^{(a) 2 Adm. Rep.} p. 110, in which it appeared, that the ship sailed with an intention of breaking the blockade of *Hacre*, or rather under the chance of finding that the blockade had ceased: She met with admiral *Duncan's* fleet, and was informed that *Havre* was open; and the Court held, that after that permission, she was not to be considered as taken *in delicto*. In the present case, the ship was permitted to go in with a cargo.---Looking at the facts, that she came from the South of *Europe*, and that she was actually permitted to enter, I think she brings herself within the scope of the favourable considerations applied to that former case. It is impossible for me to say this, without observing at the same time, on the great mischief that ensues from this sort of inattention practised by our cruisers---It is in vain for governments to impose blockades, if those employed on that service, will not enforce them: The inconvenience is very great, and spreads far beyond the individual case; reports are eagerly circulated, that the blockade is raised; foreigners take

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Juryman
MARIA
SCHROEDER.
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CASES DETERMINED IN THE

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1801.

take advantage of the information; the property of innocent persons is ensnared, and the honour of our own country is involved in the mistake.

Ship restored (a).

June 20th,
1801.

(In the same Case, as to the cargo.)

THE question as to the cargo of the *Juffrow Maria* came before the Court, on 24th June 1801: when affidavits were offered from several claimants, stating their ignorance of the blockade of *Havre* at the time of shipment; and it was contended, that

(a) In the *Vrow Barbara, Diederickson*, which was a case of a ship taken on a voyage from *Havre* to *Hamburg*, 5th July 1799, it appeared that she had been stopped and examined in going into *Havre*; and had been informed, on asking whether she might go in? "that on a particular signal (which was afterwards made) she might." The master in this case acknowledged, "that he had known of the blockade, but understood that it had been relaxed."

For the claimant, Laurence said—It was a case in which all the favourable consideration applied to the *Neptunus*, and the preceding case concurred; that, on being warned off from the ports of *Holland* by the *Courier*, 26th April 1799; the master of this vessel asked, if she might go on to *Havre*? it was answered "she might;" she went on, and was permitted to go in, and come out; and was at last picked up by one of the same squadron, with the *Courier*, who had warned her off from the ports of *Holland*, having at that time no intimation of the blockade of *Havre*.

The Court considered this to be a case still more strongly entitled to a favorable application of the principle.

Restored.

that under the general relaxation of the blockade of *Havre*, which had appeared to have taken place, during the winter 1798, and the ensuing spring and summer, these persons had been led to suppose, that it had altogether ceased; and therefore that orders given under that mistake, were to be considered, as given in a state of justifiable ignorance, and could not be imputed to them as a breach of the blockade of *Havre*.

The
JURASSIC
MARIA
SCHROEDER.

June 20th,
1801.

JUDGMENT.

Sir W. Scott.--The rule by which the Court has been induced to act towards certain vessels, in consequence of the relaxed manner in which the

In the case of the *Henricus, Draik*, captured 8th Sept. 1799, on a voyage from *Havre* to *Lisbon*, a similar excuse prevailed; the master stated that he had received permission of the *Duchess of York* to go in with a cargo of coals, and was captured on his returned voyage. The Court held the permission to go in with a cargo, included the permission to that ship, to come out with a cargo.

Ship restored.

In the *Vensab, Heitman*, taken 3d October 1799, going into *Havre*, the papers purported the voyage to be from *St. Martin's* to *Copenhagen*. To account for the deviation it was said, that the ship had sustained damage and was obliged to put in; that during the period in which the Court had determined there was no blockade existing, from Nov. 1798 to Sept. 1799, she had gone in and out, without molestation.

The Court held this ship to be entitled to the same principle; but observed--"I beg it may be understood, that I hold the blockade to have existed generally, though individual ships, in some few instances, are entitled to an exemption from the penalty, in consequence of the irregular indulgence shewn to them by the blockading force. It has never been held by the Court that no blockade existed from Nov. 1798 to Sept. 1799.

blockade

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JURISPRUDENCE
MARIA
SCHAOEDER.

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1801.

blockade of *Havre* appeared to have been enforced, in those particular cases, by no means interferes with the general effect and operation of this blockade; on the contrary, the Court has held, that there was no general relaxation, although particular vessels were considered to be protected, by the loose manner in which the blockade was kept up towards them. The ship in the present case was restored, on the ground, that she had been allowed to go in with a cargo, and therefore might be understood to be at liberty to come out with a cargo: But the extent of that principle is to be confined to those who had been the objects of this improper indulgence.—The ship was restored; but it by no means follows, that the owners of the cargo stand on the same footing: That may have been shipped, in consequence of criminal orders, directing it to be sent on any opportunity of slipping out: It is therefore not to be argued, that the release of the ship is any conclusive evidence respecting the cargo.

Then, how stands this case as to the owners of the cargo. After the blockade had been notified, the most prudent conduct would have been, to wait for a relaxation from the belligerent who imposed the blockade, before they gave any orders: at any rate, it could go no farther than this, that the orders should be provisional, directing shipments to be made when the blockade should be raised; as an absolute order during the continuance of a blockade, if executed, must be considered to be a breach of that blockade—Under any circumstances such a provisional order would be attended with great hazard, in respect to the good faith,

faith of the enemy shipper, who may be under a temptation to ship off his goods, without regard to the risk of his employer---and this risk persons giving such order must be content to take on themselves. The affidavit that has been introduced only states, "that he was ignorant at the time of shipment:" That will not be sufficient; that will not purge away the offence at the time of giving the orders. The parties must either state themselves to have been ignorant of the blockade at the time of ordering the goods, and shew the grounds of their opinion arising out of any of these particular instances of relaxation to individual ships; or at least they must shew that the orders were provisional. Under this affidavit they have not brought themselves within the limits of this indulgence, and I reject the application.

In some other claims *Laurence* said, there were several affidavits which had not been translated, and might prove *orders given provisionally*.

The Court was at first disposed to let them stand over---*afterwards*, *On consideration*, I think the indulgence will not avail them; because, supposing they should make out, that they gave a conditional order; still I hold that the blockade did actually exist, at the time when they were carried into execution; and they must take upon themselves to answer for the undue execution of those orders, and make the shippers answerable to them. If this rule was not adopted, there would be no end to shipments made during a blockade, whilst there would be nobody at all responsible for such acts of misconduct.

Cargo condemned.

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JUFFROW
MARIA
SCHROEDER.

June 20th
1801.

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1800.

Violation of
neutral terri-
tory, by capture
within the
limits of its
protection—
ship lying
within the terri-
tory cannot
send boats be-
yond the line
of division for
the purpose of
capture &c.

TWEE GEBROEDERS, ALBERTS Master.

THIS was a case respecting four *Dutch* ships, taken in the *Western Eems*, in or near the *Groningen Wat*, by boats, sent from *L'Espéigle*, then lying in the *Eastern Eems*. The material point of the case turned on the question of territory. The *Prussian* consul claiming restitution, (by the direction of the *Chargé (b) des affaires of Prussia*), on a suggestion, that it was a capture made within the protection of the *Prussian* territory.

JUDGMENT.

Sir W. Scott.—This ship was taken on the 14th July 1799, on a voyage from *Emden* to *Amsterdam*, which was then under blockade; a claim has been given by the *Prussian* government, asserting the capture to have been made within the *Prussian* territory. In the course of the discussion, which this suit has produced, it has been contended, that although the act of capture itself might not take place within the neutral territory, yet, that the ship to which the capturing boats belonged was actually lying within the neutral limits; and there-

(b) In claims of this nature it has been held in the *Etrusco*, and in other cases, that a suggestion of neutral territory cannot be set up by an individual claimant, but that it must proceed from the government, whose territory is asserted to have been violated.

fore,

fore, that wherever the place of capture might be, the station of the ship was in itself sufficient to affect the legality of the capture.

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TWE
GEBROEDERS.

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1800.

Upon the question so proposed, the first fact to be determined is, the character of the place where the capturing ship lay; whether she was actually stationed within those portions of land and water, or of something between water and land, which are considered to be within the limits of the *Prussian* territory? On this point, I am inclined to think, on an inspection of the charts, and on hearing what has been urged, that she was lying within the limits, to which neutral immunity is usually conceded.—She was lying in the Eastern branch of the *Eems*, within what may I think be considered as a distance of three miles, at most, from *East Friesland*: an exact measurement cannot easily be obtained; but in a case of this nature, in which the Court would not willingly act with an unfavourable minuteness towards a neutral state, it will be disposed to calculate the distance very liberally; and more especially as the spot in question is a sand covered with water only on the flow of the tide, but immediately connected with the land of *East Friesland*, and when dry, may be considered as making part of it. I am of opinion, that the ship was lying within those limits, in which all direct hostile operations are by the law of nations forbidden to be exercised: That fact being assumed I have only to inquire, whether the ship being so stationed, the capture which took place, was made under such circumstances, as oblige us to consider it as an act of violence, committed within the protection of a neutral territory.

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It is said that the ship was, in all respects, ob-servant of the peace of the neutral territory; that nothing was done by her, which could affect the right of territory, or from which any inconveni-ence could arise to the country, within whose limits she was lying; inasmuch as the hostile force which she employed, was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far; I am of opinion, that no use, of a neutral territory, for the purposes of war, is to be permitted; I do not say *remote* uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that, no *proximate* acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think, that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprizes, is an act of hostility much too immediate to be permitted: for, supposing that even a *direct hostile use* should be required, to bring it within the prohibition of the law of nations; nobody will say, that the very act of sending out boats to effect a capture, is not itself an act directly hostile—not complete indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said, that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated, nor received, on neutral ground; but no one would say, that such an act would not be an hostile act, immediately commenced within the neutral territory: And what does it signify to the

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GEBROEDERS.

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1800.

nature of the act, considered for the present purpose, whether I send out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground; the act of hostility actually begins, in the latter case, with the launching and manning and arming the boat, that is sent out on such an errand of force.

If it were necessary therefore to prove, that a *direct and immediate act* of hostility had been committed; I should be disposed to hold that it was sufficiently made out by the facts of this case.— But direct hostility appears not to be necessary; for whatever has an immediate connection with it is forbidden: you cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained, because such an act is an immediate continuation of hostility. In the same manner, an act of hostility is not to take its *commencement* on neutral ground: It is not sufficient to say it is not completed there— you are not to take any measure there, that shall lead to immediate violence; you are not to avail yourself of a station, on neutral territory, making as it were a vantage ground of the neutral country, a country which is to carry itself with perfect equality between both belligerents, giving neither the one or the other any advantage. Many instances have occurred in which such an irregular use of a neutral country has been warmly resented, and some during the present war; the practice which has been tolerated in the northern states of *Europe*, of permitting

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French privateers to make stations of their ports, and to sally out to capture *British* vessels in that neighbourhood, is of that number; and yet even that practice, unfriendly and noxious as it is, is less than that complained of in the present instance; for here the ship, without sallying out at all, is to commit the hostile act. Every government is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience to which the neutral territory will be exposed is obvious; if the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also; till, instead of neutral ground, it will soon become the theatre of war. On these grounds, I am of opinion, that this capture cannot be maintained, and I direct these vessels to be restored.

[On prayer for costs and damages.]

Court.---With respect to that, I think the situation in which the vessels were stationed, was too dubious to affect the parties with any intentional violation of neutral rights. The capture may have arisen from misapprehension and mistake. It is very different from a case of actual attack on clear neutral territory. There is no sufficient reason to induce me to give costs and damages against the captors.

THE IMINA, BAUMAN VROOM Master.

August 1st,
1800.

THIS was a case of a cargo of ship timber which had sailed July 1798, from *Dantzick*, originally for *Amsterdam*, but was going at the time of capture to *Emden*, in consequence of information of the blockade of *Amsterdam*.

On the part of the claimant it was said--That it consisted of small pieces under 20 feet in length, and that it was fit only for making of masts, to which, under the improved method of constructing masts, almost any timber might be applied; that this was no criterion of its contraband quality. Another, and more material question arose respecting the destination; as it appeared, that the master, on hearing, at *Elsineur*, that *Amsterdam* (a) was under blockade, had formed the design of changing his course for *Emden*, had entered his protest to that effect, and was, at the time of capture, sailing for *Emden*.

Blockade of
Amsterdam,
Contraband
timber, Qu. as
to the quality--
The master
having altered
his destination
on hearing of
the blockade of
Amsterdam,
the question of
contraband was
held not to
arise.
—Restitution.

JUDGMENT.

Sir W. Scott.--This is a claim for a ship taken, as it is admitted, at the time of capture sailing for *Emden*, a neutral port; a destination on which, if it is considered as the real destination, no question of contraband could arise; inasmuch as goods going to a neutral port, cannot come under the

(a) The blockade of *Amsterdam*, and of the ports of *Holland*, was suspended, by notification to the Foreign Minister, 27th Nov. 1799.—See Appendix, No. IV.

description

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description of contraband, all goods going there being equally lawful. It is contended, however, that they are of such a nature, as to become contraband, if taken on a destination to a hostile port. On this point, some difference of opinion seems to have been entertained; and the papers which are brought in, may be said to leave this important fact in some doubt. Taking it, however, that *they are* of such a nature as to be liable to be considered as contraband on a hostile destination, I cannot fix that character on them in the present voyage. The rule respecting contraband, as I have always understood it, is, that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait, till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach.

Some argument has been drawn in this case, from the conduct of the owners. It is said, "that they did not consider these articles as contraband; that they were sent openly, and without suppression or disguise;" perhaps that alone would not avail them. It appears, however, that *Amsterdam* was declared by this country to be in a state of blockade, a circumstance that would make it peculiarly criminal to attempt to carry a cargo of this nature to that port. The master receives information

tion of this fact at *Elsineur*, and on consultation with the consul of the nation, to which the cargo belonged, changed his purpose, and actually shaped his course for *Emden*, for which place he was sailing at the time of capture. I must ask then, was this property taken under such circumstances as make it subject to the penalty of contraband? Was it taken *in delicto*, in the prosecution of an intention of landing it at a hostile port? Clearly not---But it is said, that in the understanding and intention of the owner it *was* going to a hostile port; and that the intention on his part was complete, from the moment when the ship sailed on that destination: had it been taken at any period previous to the actual variation, there could be no question, but that this intention would have been sufficient to subject the property to confiscation; but when the variation had actually taken place, however arising, the fact no longer existed. There is no *corpus delicti* existing at the time of capture. In this point of view, I think, the case is very distinguishable from some other cases, in which, on the subject of deviation by the master, *into a blockaded port*, the Court did not hold the cargo to be necessarily involved in the consequences of that act. It is argued, that as the criminal deviation of the master did not there immediately implicate the cargo; so here, the favourable alteration cannot protect it; and that the offence must, in both instances, be judged by the act and designs of the owner. But in those cases there *was* the guilty act, really existing at the time of capture; both the ship and cargo were taken *in delicto*; and the only question was, to whom the *delictum* was

to

The
IMPERIAL
August 1st,
1800.

The
INNA.

August 1st,
1800.

to be imputed ; if it was merely the offence of the master, it might bind the owner of the ship, whose agent he was; but the Court held, that it would be hard to bind the owners of the cargo by acts of the master, who is not *de jure* their agent, unless so specially constituted by them. In the present instance, there is *no* existing *delictum*. In those cases the criminal appearance, which did exist, was purged away, by considering the owners of the cargo not to be *necessarily* responsible for the act of the master : but here there is nothing requiring any explanation : The cargo is taken on a voyage to a neutral port. To say, that it is nevertheless exposed to condemnation, on account of the original destination, as it stood in the mind of the owners, would be carrying the penalty of contraband further than it has been ever carried by this, or the Superior Court. If the capture had been made a day before, that is, before the alteration of the course, it might have been different; but however the variation has happened, I am disposed to hold, that the parties are entitled to the benefit of it ; and that under that variation the question of contraband does not at all arise. I shall decree restitution ; but as it was absolutely incumbent on the captors to bring the cause to adjudication, from the circumstance of the apparent original destination, I think they are fairly entitled to their expences.

Restitution. Captor's expences decreed.

TRE BARBARA, BANKER Master.

August 6th,
1800.

THIS was a case of salvage on the recapture of a *Danish* ship, with a cargo documented as *English* property, captured by a *Spanish* vessel, and retaken by an *English* ship of war, the *Hazard*.

On the part of the claimant of the ship; *Laurence* argued, that there had been no case in which the Court had determined that the recapture of neutral property from the *Spaniards*, would entitle the re-captors to salvage; that the old practice of this Court had not allowed salvage in such cases; that the alteration which had taken place, during the present war, in respect to neutral property retaken from the *French*, stood on particular grounds, the irregularity of the *French* Courts of Prize during the present war; that no imputation of this sort attached on the prize proceedings of *Spain*, and therefore that those cases (*vide* the *War Onskan*, 2d Adm. Rep.) were no authority for the present case. It was said, besides, that the captors in the present case were not entitled to the aid of the Court, on account of the irregularity of their proceedings; that they had not brought the cargo to adjudication, but had *settled* that, as it was termed, with the asserted owners.

Salvage on re-capture of neutral property from the *Spaniards*. Qu. if not to be distinguished from cases of recapture from the *French*—
Owing to the irregularity of the captors the Court rejected the application for salvage, refusing to lend the aid of the Court to captors guilty of irregularity, &c.

JUDGMENT,

The
BARBARA.

August 6th,
1800.

JUDGMENT.

Sir W. Scott.---I shall certainly not give salvage in this case, though I determine nothing on the general principle. Being a recapture of neutral property, it is not within the operation of the prize act; and I shall not lend the aid of this Court to persons coming to seek it, after having behaved so irregularly.

Salvage refused,

REPORTS

OF

C A S E S

DETERMINED IN THE

HIGH COURT OF ADMIRALTY,

&c. &c. &c.

THE NEPTUNUS, KUYP Master.

*August 8th,
1800.*

THIS was a case arising out of the blockade of *Amsterdam*, in respect to the several parts of a cargo, shipped in *July* and *August*, 1798, under the orders of neutral merchants of *Hamburgh* and *Portugal*. The claims of several persons at *Hamburgh*, and other neighbouring ports, were condemned under the general rule respecting shipments in a blockaded port, after notification.

Blockade of
Amsterdam:
Time for notice
to *Portugal*—
Agency of per-
sons in the
blockaded port,
Considera-
tions respecting
the responsibility
attaching under
it on the neutral
merchant.

On behalf of claimants resident in *Portugal*, it was prayed that the court would allow some indulgence, in respect to the distance of their situation; and permit them to show, that the shipments were made under orders given previous to the blockade.

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1 Adm. Rep.
p. 289.
Lords, Aug. 12,
1801.

JUDGMENT.

Sir *W. Scott*—It appears to me, that this case is distinguishable from the case of the *Columbia*, and others [cited in the argument for the captors] in which the dominion and power over the ship and cargo were entrusted to the master and the agent of the claimants. It might be attended with great hardship to neutral merchants, if a responsibility for the acts of agents in the enemy's country was to be bound down without any consideration on them, with the same strictness with which the law imputes the acts of agents in ordinary cases to their employers; it is obvious that such agents may have private interests in shipping off the merchandize of their ports, whilst under blockade, without attending sufficiently to the risk of their principals. I shall permit the orders to be produced, that it may be seen whether there has been time for counter-ordering the respective shipments after the notification of the blockade; and whether due diligence has been used to this effect on the part of the several claimants.

On a subsequent day, the letters of orders were produced. In one claim, a letter of orders was exhibited 17th *October*, 1797, "to send with all possible dispatch;" and a letter of advice of 19th *July*, 1798, giving information that the goods had *all* been put on board.

JUDGMENT.

Sir *W. Scott*—This is the case of goods, put on board a vessel, which, from the time of sailing, has been pronounced to have been guilty of a breach of

the blockade of *Amsterdam*, (2 Adm. Rep. p. 110.) *Prima facie* certainly, the cargo is to be considered as liable to the same judgment. It appears that the shipment was made between the 9th and 19th of *July*, the notification of the blockade of *Amsterdam* having been made on the 11th *June*, 1798: The first order that the Court made, was for the production of the letters of orders; because, if it had appeared that they were given after the time, when the notification could by a fair possibility be supposed to have been known to the person giving the orders, he would be bound directly by his own act; or, if they were sent *previous* to the notification, two questions might arise; 1st, whether sufficient time had intervened since the notification, to have given him an opportunity of counter-ordering the shipment; for if so, he would be legally answerable for the consequences of his own negligence; or, 2dly, if sufficient time had not intervened, whether, though personally free from all imputation of offence, the claimant might not be bound by that powerful general principle of law, which holds the employer responsible for the acts of his agent—The date of the order in this instance takes the party out of the first description; because it being given, in *October*, 1797, long before the blockade *de facto* commenced; the parties are entirely exculpated from all offence in this stage of the transaction. But then, the second question arises; whether there was not time to counterman?

On this point, it would perhaps be holding the party too rigorously to the strict principle of law, to say, that he might have written with a hope, and under the

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chance of countermanding the order *in time*; the notification was made on the 11th of June; in all probability it was not known at *Lisbon* till the latter end of that month; as an interval of three weeks might not be too much to allow for the communication with that place. Supposing the notification to have been known there at that time, we must recollect, that the party might naturally conceive, from the time which had elapsed, and the particular directions which had been at first given to make the shipment "with all possible dispatch," that the order had been already executed, and that, if he had written to counter-order, the letter would not have been received till the shipment had been actually carried into effect. The claimant stands therefore fully justified, as far as his own personal act can be considered. But then, it comes to this general question, which I am not aware that the Court has yet fully decided, Whether the owners are, in all cases, bound, *merely by the act of their agents*? the abstract rule is undoubtedly just, that persons are bound by their agents—but two or three considerations weigh much to induce me to limit the extent and application of this principle in these particular cases. In the first place, I cannot but recollect, that the law of blockade is a thing rather out of the common course of mercantile experience; it is new to merchants, and not very familiar to lawyers themselves. It might be therefore a little too rigorous to expect, in the very first instance, an exact compliance with the strict rule of law.—A second consideration is, that the agents of foreign merchants in the enemy's country, that country being under blockade, do not stand in the same situation

as other agents : they have not only a distinct, but even an opposite interest from that of their principal, to fulfil the commission at all risks, as rapidly as possible, for their own private advantage, and for the public interest of their country, at that time under particular pressure as to the exportation of its produce. This may fairly be allowed to impose a strong obligation on the candour of the Court, not to hold an employer too strictly bound, on mere general principles, by an agent, who may be actuated by interests different from those of his principal.

[The Court directed the counsel to proceed on the other claims in the case.]

In the second claim, the letter of orders appeared to have been written 12th *December*, 1797, but renewed in a subsequent correspondence of the 19th *June* and 10th *July*, 1798.

Court—This claim stands clear of all questions of agency, as it appears that the last order was given so late as the 10th *July* by the party himself. The only question is, Whether there is not conclusive reason to believe that the blockade of *Amsterdam* was known at *Lisbon* at that time. The party has had full opportunity of proving his ignorance, and has not done it. It is impossible to infer that ignorance merely from the circumstance that the blockade is not mentioned in the letter exhibited. The Court is strongly inclined to hold that the blockade must have been known at *Lisbon* on the 10th *July*.

The final determination on this case was reserved for more precise information to be obtained, respecting the time when the notification of the blockade of *Amsterdam* was known in *Portugal*.

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*August 13th,
1800.*

THE FLOREAT COMMERCIUM, RADECKER Master.

Contraband—
same owner—
false destination.
Ship and cargo
condemned.

THIS was a case of a ship and cargo of hemp, claimed on behalf of the same owner, bound from *Lubec*, ostensibly, to *Lisbon*, but going actually under the protection of a false destination to *Bilboa*.

Ship and cargo condemned.

*August —
1800.*

Petition to take
cargo on bail
before adjudica-
tion, not granted
but upon con-
sent.

THE COPENHAGEN, MULLENS Master.

IN this case, *Arnold* moved the Court to allow a cargo of *Batavian* produce to be taken on bail before the hearing of the cause, on a suggestion that it consisted of articles much wanted at *Copenhagen*, and for which the market here would not afford an adequate price.

Court—Is it opposed, or do the captors consent?

[Answered, that they did not consent.]

Court—I know of no instance in which the Court has made such an order, unless where all the parties are consenting to it. The proper remedy for the inconvenience stated in this petition would be a commission for appraisement and sale.

THE SALLY, BEETLE Master.

Oct. —
1800.Petition to
amend claim
rejected.

IN this case, the ship was documented as the property of the master, and the cargo shipped by *Watson*, and going to be delivered to _____ at *Amsterdam*; no claim having been given, the King's Advocate moved the condemnation of ship and cargo. An affidavit was now exhibited on the part of *A. Pouall*, another American merchant, asserting the property of the ship and cargo to belong to him, and stating, that being a *German* by birth, he had executed a colourable bill of sale to the master to protect his property from capture, and that the cargo was falsely described for the same reason; that it was really shipped by him, and going to his consignment, he being on board; that he had neglected to claim only because he was a stranger in this country, without money or credit, and had on that account been unable to find bail.

Laurence referred to the circumstances set forth in the affidavit of Mr. *Pouall*; and prayed that the Court would allow him farther time to file his claim.

The court said, that the tale which had been set forth in the affidavit, appeared utterly incredible; that no ground had been laid to entitle the party to any particular indulgence, or to authorize the Court to depart from its general rule of practice. The matter was, however, directed to stand over till the next day.

On a subsequent day, Mr. *Tunno*, a merchant of this town, appeared, and gave in a claim for Mr. *Pouall*; and the claim was ordered to farther proof. In the farther proceedings of this cause, the property was condemned, no farther proof being exhibited.

*Oct. 8th,
1800.*

Freight, pro
rata, on capture
and recapture,
not given, to a
ship brought
back to the port,
or quasi port of
her departure.

THE HIRAM, STILL Master.

THIS was an application for a freight *pro rata*, for so much as had been performed, at the time of capture, of a voyage from *Liverpool* to *Halifax* and the *West Indies* and back. It appeared that the ship had been captured by the *French*, and afterwards recaptured and brought to *Plymouth*.

A. D. 1681.
Liv. 3. tit. 3.
art. 19.

On the part of the Ship, Sewell—In the case of an interrupted voyage, where the interruption happens without the fault of the owner or master of the ship, a *pro rata* freight is due under the authority of the ancient maritime law, *Roccus*, p. 55, & 80. And by the *Ord. Louis 14*, if a ship is taken and ransomed, the master shall be paid his freight to the place of capture. There is also a modern case exactly in point, 2d *Burrows*, 882, *Luke v. Lyde*, in which, on these facts, “that the ship had sailed from *Newfoundland* for *Lisbon*, and had been captured after a course of 17 days by the *French*, within four days sail of *Lisbon*, and was afterwards recaptured, and brought to *Biddeford*,” Lord *Mansfield* held that the ship was entitled to freight, *pro rata itineris perpetrati*. The terms of the contract in this particular case necessarily point to such an interpretation, as the meaning of the parties; it was a contract for a freight *per month*, and not for the entire voyage, or according to any proportion of the course performed; and with a farther clause, “that if on the returned voyage loss or capture should happen, no more freight than

what was to be paid at *Halifax* should be due." The omission of this clause, as to the outward voyage, shews the sense of the parties to have been, that no loss of freight should attach on the ship in consequence of those accidents on the outward voyage: Under any other construction, the ship might have been kept for an indefinite time, by the delay of persons employed on her lading, and yet if the accident of capture and recapture intervened, that demurrage might be thrown on a ship as a loss, for which no compensation was to be allowed. The date of the charter-party was 5th *July*, and the vessel was not laden till the 2d *September*. At the time of capture, she had actually traversed somewhat more than half the voyage, from *Liverpool* to *Halifax*; but the freight is not estimated by the distance only, but by the time, *per month*, that had elapsed since her beginning to take the first bale of goods on board, up to the time of capture.

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For the claimant, Laurence—The foreign writers which have been cited are no authority for the case; inasmuch as they are treating only of the ordinary circumstances of interruption, occurring in time of peace, and are not applicable to the case of capture of war. By capture all liens are determined; the contract is extinguished in the common misfortune. It is true they may in some instances be revived again; under circumstances similar to those in the case of *Luke v. Lyde*, that might be equitable with respect to the interest of freight; where a cargo is brought from a considerable distance (as was the fact in that case, of a quantity of fish brought from New-

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HIBAUX.
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foundland to Europe) and coming eventually into the hands of the owner or his agent, at or near the port to which it was originally destined, goes on ultimately to the intended market, it might be but equitable that some freight should be paid; but this is a very different case. *Here* a common misfortune has extinguished the contract, in such a manner as to frustrate the whole purpose of the voyage. The cargo has been brought back, if not to the port of shipment, to the same country at least; no service has been derived, in any degree, from the course that had been run. So far are the terms of this charter-party from making any distinction favourable to the ship on the outward voyage, that they expressly provide, that the first payment of £ 500 shall be made *on the arrival of Halifax*. This clause being express, as to the contingency on which the first payment should be due, it became unnecessary to insert any mention of loss or capture in that part of the charter-party; and the inference from the omission in this clause is rather the reverse from what has been attempted to be drawn from it: for instead of shewing that the parties meant to be governed by a different rule on the outward and homeward voyages, it shews that the consequence was to be the same, although different terms were used to express the same thing. On the returned voyage no freight was to be paid, "in case of loss or capture;" and in the outward voyage, "the first payment of freight was to be made on the arrival at *Halifax*;" implying that on any loss or capture happening to prevent that arrival, no payment was to take place.

JUDGMENT.

Sir W. Scott—This ship appears to have been chartered, to go on a voyage from *Liverpool* to *Halifax*, from thence to one or more of the *West India* islands and back to *Liverpool*; the terms of the charter-party are “that she was to receive a freight of £210 for each month—£500 on delivery at *Halifax*, in bills of three months on *London*, and the remainder on the delivery of her returned cargo at *Liverpool*, with a proviso, “that if the voyage was performed in less than six months, freight should notwithstanding be paid for six months certain.” This last circumstance tends strongly to show, that it was not so much the time, as the actual accomplishment of the voyage, that was the material object in the contemplation of the contracting parties. To the same effect there is another clause, respecting the returned voyage, “that if the ship should be lost or taken after sailing from *Halifax*, no more freight should be due.” The vessel took in her lading at *Liverpool*; whether she suffered by any delay or not does not appear; there is no complaint made that she was improperly detained; and indeed it is not likely that it should be so, as it must have been equally for the interest of the ship and cargo that every thing should be forwarded with all possible dispatch.

The ship sailed and was taken, and afterwards retaken, and brought back to a *British* port; which is, in fair consideration of law, to be taken, as if she had been brought back to her own port—She was brought actually to *Plymouth*; the distance from which port to *Liverpool* is so short, in comparison of the whole projected voyage, that I may be justified

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in considering it, in effect, the same as if she had actually brought back to *Liverpool*. That being the case, the question will be, whether, under the general law, or under the particular terms of this contract, any, or what part of the freight becomes due? I am of opinion, that under either of these authorities, no *part* is due—The case of *Luke v. Lyde* has been pressed upon the Court; that was a vessel, chartered from *Newfoundland* to *Lisbon*, taken in a very late stage of her voyage, afterwards retaken and brought to *Biddeford*. On these facts, Lord *Mansfield* held, that a great part of the voyage had been accomplished; and that, agreeably to the old authorities,* the ship was entitled to a freight *pro rata*

* *Roccus* seems to speak of cases only where some part of the voyage remains performed, “*Declaro hoc dictum, ubi nauta munere vehendi in parte sit functus; quo merces inventae sunt, vecturam deberi æquitas suadet, et pro ea rata mercedis solutio fieri debet.* p. 80.” The chapters of the *Consolato*, 81, 82, 83, treating of this matter, do not speak specifically of a voyage partially performed, but they put several cases, of merchants receding from their contract—before lading they shall be answerable for the expences of the master.—If the ship is in great readiness to receive a cargo, they shall pay one third of the freight.—If any cargo is laden, *one half*.—If the ship has sailed, *the whole*. But these cases all proceed on the supposition of a *voluntary retrocession* on the part of the merchant, in which he may be supposed to have *consulted his own interest*, as in the case put (ch. 83.) of *selling* the cargo after the contract. If the mere traversing the ocean, almost up to the very port of destination, attended with a capture and recapture, and bringing back to the place of departure, was to be paid for *pro rata*, the *whole* freight must be paid, and without any benefit to the merchant, but under loss and delay; which would be a payment as great as that the *Consolato* prescribes for an interested or voluntary retrocession *on the part of the merchant*, or for a case of fraud.

itineris peracti. But then I am to consider that the ship was brought to *Biddeford*, from which port to *Lisbon*, the voyage is frequently not more than six or seven days; she had therefore almost arrived at the port of her original destination. To make that a parallel case with the present, we should enquire what would have been the opinion of that noble person, if the ship had been carried back to *Newfoundland*? In such a case, it would have been a complete defeasance of every thing that the ship had done towards the accomplishment of the contract. It is said, in the present case, that the ship was not in fault—certainly not; neither was the cargo. If the cause of capture could be imputed as a fault, arising out of the national charater, it was common to both; some of the consequences of this misfortune also are common to both; though there may be others peculiar to the several interests of the ship and cargo. It is said, on the part of the ship, there is the wear and tear, the loss of time, and the consumption of provisions. But is there nothing of that sort falling on the cargo? Is there not leakage and ullage, and besides, the peculiar loss of the particular market for which it was assorted?

On this view of the matter, considering it as the case of a ship brought to the *quasi* port of her departure, I am of opinion, that the doctrine of freight *pro rata itineris peracti* cannot be maintained. The Registrar has stated that it has not been usual, in the practice of this Court, to give freight in such cases; and, therefore, on all general principle and practice I should pronounce, that the parties are not entitled—But still farther, on the particular

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terms of the contract, I think this demand cannot be sustained. The charter-party stipulates "that the freighter shall not pay any part till the arrival at *Halifax*; where £500 should be paid; and that if she arrives safe, and shall be taken or lost afterwards, no more shall be paid, *or become due*;" it is said, that the words "become due" are not in the former part of the instrument; but it is to be remembered, that this is an instrument not usually drawn up with strict technical precision. The obvious meaning, according to common apprehension must be, that no part was to be paid unless the ship arrived at *Halifax*: that event was prevented by the accidents of war.—I think on the whole, that the Court cannot, without deviating not only from the settled principle and practice but from the fair sense of the particular contract between the parties, order any part of the freight to be paid; and I reject the application.

Oct. 15th,
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THE PHOENIX, SUSINI Master.

Colonial trade—
Voyage from
a French colony
with false destination to Altona,
actually to
France or Spain.
Ship and Cargo
condemned.

THIS was a case of a ship and cargo taken on a voyage from *Guadaloupe*, ostensibly, to *Altona*, but captured off *Cape Finisterre*, with a *French* pilot on board, and, as it appeared to the Court, going actually into some *French* port, or into *Corunna*. A claim was given for both ship and cargo, as the property of Mr. *Susini*, a person born in *Tuscany*, but residing chiefly in *French* islands.

For the captors, the King's Advocate and Arnold—
 There are several grounds on which it is impossible for this person to obtain restitution on the present evidence. The proofs of property are very doubtful and imperfect, and the suspicion very strong, that this person who appears to have been wandering about on different adventures, could not be the *bonâ fide* owner of this property, for which no adequate funds appear in any part of his history. His national character is, besides, so composed as to bring him under the description of a *French* merchant. But these grounds are immaterial, any further than to shew the true and original complexion of this case; as were the property and neutral character allowed to be fully proved, the course of the voyage would be alone sufficient to subject both the ship and cargo to confiscation. It is a voyage, as it is asserted, to *Altona*; but at the time of capture they were found sailing so far south as the cape of *Finisterre*, with a *French* pilot on board, and as it is confessed by one witness, "going into *Corunna* for water;" another witness acknowledges that he was hired to go on a voyage direct to *Bourdeaux*—taking it therefore to be a voyage between the colony and mother country of the enemy, or between the colony and mother country of an ally in the war, the cargo would be subject to condemnation on the authority of several cases determined in this Court (the *Immanuel*, *Eysenberg*, *Rose*, *Young*). But those were cases of an open and professed destination, and in them the Court restored the ships. In this case, there is the additional aggravating circumstance of a destination *fraudulently coloured* to disguise the real course of the transaction.

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P. 186—216.

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That an additional penalty should attach on such a case would be highly reasonable, and in the case of the *Fortuna, Norberg*, the Court did consider the fraudulent conduct with which the whole of that case was covered, as a just ground for condemning the ship.

On the part of the claimant, Laurence and Sewell denied the sufficiency of the arguments with which it was attempted to impeach the property and the national character of the claimant. On the question of law, it was contended that there had been no case determined by the Court which could be deemed an authority for the present case. The *Fortuna, Norberg*, was a case in which the destination was between the mother country and the colony; but the ground of condemnation in that case was the *gross fraud* apparent in every part of the case. In the present case no such imputation could be sustained; allowing the course, at the time of capture, to have been for *Corunna*, it had arisen only from a supervening necessity, which in no degree impeached the truth of the original destination to *Altona*.

JUDGMENT.

Sir W. Scott—This is the case of a ship which is claimed as well as the cargo for a person of the name of *Susini*, whose history has been very eventful, and leaves considerable doubt on the important question of real national character. He appears to have been a native of *Tuscany*, who had resided a considerable time in *St. Domingo*, and was at that time the owner of a *French* vessel called the *L'Aigrette*. When Je-

remie was taken by the *British* forces, the same vessel continued to be navigated by him under *English* colours, and was, as such, taken and condemned by the *French*; he then went to *St. Thomas*, where he remained inactive and unemployed two years; he now describes himself as a burgher of *St. Thomas*, and considers himself to have been for the last five years a subject of the king of *Denmark*; but during that time, *St. Thomas* seems to have been as little visited by him as any other spot of the globe: He is not a married man, holding any connexion with that place by the residence of his wife and family: He is a navigator, and appears to have been personally during these five years hardly there at all. Under these circumstances, it is not a burgher's brief alone, that will be sufficient to controul all other circumstances of his history and conduct, and to entitle him to the privileges of a clear and undoubted neutral person.

At *St. Thomas*, he says, he purchased this vessel, and went to *Jeremie*, where he was first detained; but being released, he went to *Cuba*, sold his cargo, and bought another, with which he went, *not to St. Thomas*, but to *Baltimore*, from thence to *Angola* in *Africa*, where he took cargo of slaves, and sold them at *St. Thomas*; from thence he went to *Baltimore* again, and took a cargo with which he returned to *St. Thomas*, *not to sell his cargo but to enquire the state of the West India market*; he stayed there only ten days, and then went to *Cape François*, where he disposed of his cargo; and from that time he appears never to have been at *St. Thomas*.

From *St. Domingo* he took a cargo of colonial produce on a destination to *Altona*, but put into *Bou-*

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PHENIX.

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*Oet. 23d,
1800.*

Joint capture:
Being in sight,
but sailing in a
contrary direc-
tion—Fraud in
actual captor
postponing cap-
ture to defeat the
sight of another
party—Facts not
proved, claim
rejected,

THE ROBERT, PATERSON Master.

THIS was a case of joint capture, in which an allegation had been admitted on the part of his Majesty's ship *Defence*. The cause now came to be heard on the proof of facts, and the general principles of law applying to them.

The circumstances of the case were, that it was a capture made on the breaking out of Dutch hostilities of a large Dutch merchant vessel coming from the *East Indies*; on approaching the English coast, owing to the distress of the vessel and sickness of the crew, the master was obliged (though very reluctantly, on account of suspected hostilities) to put into a British port; and for that purpose he had taken on board a pilot to carry her into *Dartmouth*. In the course of that evening, information was received in *Dartmouth* of the arrival of such a vessel on the coast, and the mate of a revenue lugger (the *Alarm*) slipt out of port the next morning, and made the *actual capture, in sight*, as it was asserted, of His Majesty's ship *Defence*; and, as it was farther alleged, after having fraudulently sailed past the prize, and concealed her purpose, in order that the *Defence* might be out of sight.

30th October.

JUDGMENT.

Sir W. Scott—This is the case of a demand of joint capture, set up by His Majesty's ship the *Defence* on a plea of having contributed to this valuable cap-

ture; the actual capture having been made by another vessel, whose character is allowed to have been that of a non-commissioned vessel, and who will therefore entitle the Admiralty to that interest, which she would herself have taken if she had been provided with a commission of war against the *Dutch*.

It is unnecessary to observe, that the party setting up a claim of joint capture must make out his case, and that the burthen of proof lies on him. The act of parliament has been extended, for the purpose of preserving the harmony of the service, to let in some remote claims; but the facts out of which those claims are to arise, must be proved in the most direct manner. Where no actual assistance is alledged, the presumption of law leans in favour of the actual captor; and where fraud is suggested against him by the party setting up a constructive claim, the original presumption is still farther strengthened; inasmuch as the law always presumes against imputed fraud: In such a case, the proof that will be required to controul the united force of both these presumptions, must be proportionably stronger and more direct.

The case represented in the allegation of joint capture is, "that the *Defence* was in sight at the time of capture, or, if she was not in sight, that she was *fraudulently prevented* by the artifice of the captor." The *being in sight*, generally, and with some few exceptions, is sufficient to entitle a party to share as a joint captor. But the first question that arises here, is, whether one of those exceptions is not the very circumstance that is alleged, on the part of the actual captor against this claim, "that the *Defence* was pursuing a contrary course." The second question

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he had said of the former voyage, under the same circumstances, "that that was to *Altona*." To the 12th he says, "the cargo was to be delivered at *Altona*." To the 29th, "that he was steering at the time of his being pursued towards *Altona*," saying nothing of the previous part of the voyage, nor giving any account how he came so far down as *Cape Finisterre*, within two leagues of *Corunna*: Such a deviation might certainly happen from accident or innocent mistake, but still it is a circumstance to be accounted for, and not a word does he say about it. It is besides to be observed, that there is not one letter on board addressed to any person at *Altona*. The master is going *novus hospes* to a country where he was a perfect stranger, and yet he appears not to have carried with him any particular recommendation or consignment to any merchant of that place. There is no bill of lading, nor any one paper mentioning *Altona*, except a declaration at the *French* custom-house, and a contract with one of the mariners. These are the only papers that point in the least degree to *Altona*; and it is surely not too much to say, that the master does not venture to assert a *real and direct destination to Altona*. Then what do the other witnesses say? The pilot is a *Frenchman*, as he himself admits, who had never been to the north of *Bourdeaux*, and knew nothing of the local navigation of the *British* channel; *Bourdeaux* he knew well, being bred and born there; but would any man of common prudence, meaning to avoid *French* connexions, take a pilot on board so invariably riveted to *Bourdeaux*? This is, however, not the course on which they pretend to be going; even this pilot is guilty of prevarication and falsehood; he pretends that they

were going into *Corunna* for water; but another witness confesses that he was hired expressly to go to *Bourdeaux*; and the fact is, that there appeared to have been no immediate want of water, as there were six barrels remaining on board.

This being the case, taking all the circumstances together, fortified as they are by the great similarity between them and the course of the former voyage; seeing, that the pilot is a person particularly adapted to navigate the vessel to *Bourdeaux*; I have not a doubt that this is a voyage originally to *Bourdeaux*, under a false and colourable destination, and that there never was an intention of going to *Altona*. Upon these facts, I shall hold the ship as well as the cargo to be subject to confiscation.

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Dec. 1801. In the case of the *Star*, an *American vessel*, bound from *Teneriffe*, ostensibly, to *Hamburgh*, but going actually at the time of capture into *Corunna*.—An excuse was set up to account for this deviation, that they were in want of water and fire wood, and that a storm had, a day or two before, swept away her studding sails. The Court being of opinion that the state of distress, if fully proved, was not of that magnitude that would justify a deviation into an enemy's port, and that the truth of the fact was not supported by the entries in the journal, or the general evidence in the case, pronounced the ship and cargo subject to condemnation; saying, that it was a case so similar in its circumstances to the case of the *Phænix* that it must fall under the same principles of law.

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deau, owing to bad weather; from *Bourdeaux* he sailed again for *St. Thomas*, but the same bad fortune attending him, he never got there, but was taken by a *French* privateer and carried to *Guadalupe*, where the government of the island compelled him to sell his cargo; from *Guadalupe* he sailed on the present voyage, as it is asserted, to *Altona*. From this account it is evident, that the ship has had as little connection with *St. Thomas* as possible; and that her voyages, whether voluntary or not, have been much more directed to *French* ports than to any ports of *Denmark*. Then as to the crew—they are described generally as *French*, *Italians*, and *Spaniards*, but the fact is, that four are mentioned specifically as *Italians* and *Spaniards*; from which I may conclude, that the rest, not particularly described, are *French*. The pilot is a *Frenchman*; and it appears, that the pilot in the former voyage was a *Frenchman* also; so that if the claimant meant to hold out his ship as a *Danish* vessel, he has acted throughout as improvidently as a man could do, in employing so many *French* persons to navigate her. It has been argued, that the chief part of the enumerated voyages to *French* ports have been under compulsion, and the sentence of the *French* court at *Guadalupe* has been relied on as proving the truth of this representation. But, without meaning to speak hardly, I may venture to say, adverting to what we have seen, that documents proceeding from such courts do not make complete faith.

This is the history of Mr. *Susini's* national character; and I cannot but accede to what has been said upon it, that no person can appear connected

with *Denmark* by a slighter thread than he is; it rather appears that the sin of his old character is revived, and that he is to be considered, at least, as much a *Frenchman* as a *Dane*.

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But the material question for me to consider will be the character of the present voyage:—Is it a voyage from *Guadaloupe* to *Bourdeaux*? or to *Altona*? If to *Bourdeaux*, the Court has held it, as a principle from which it will not depart, that a neutral vessel, carrying on the trade between the colonies and the mother country under a false and colourable destination, will be subject to condemnation. If neutrals will lend their vessels to the enemy, and engage them in a trade of which the legality is, in its fairest aspect, very questionable, they should, at least, do it frankly and openly: The belligerent nation will then exercise its judgment upon the case fairly proposed, and probably will determine that such a trade, even fairly conducted, is not to be tolerated. But where it is done under concealment, and with the aggravation of fraud, the party concerned clearly at once subjects himself to be considered as an enemy, in all the consequences of that transaction.

Then I am to enquire, whether this is a voyage to *Altona*? when I say to *Altona*, I should observe, that the whole of this representation is rather an assertion of counsel than of the master; for it is not a little extraordinary to see, how cautiously he ventures to say any thing that points to *Altona*: The interrogatories leading to that question, are the 7th, 12th, and 29th. To the 7th he says “the voyage was to end at *St. Thomas*,” choosing to speak of the whole outward and returned voyage together, as one; although

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that arises in this case, *viz.* whether a prevention merely by the fraud of the actual captor would authorize the Court to let in the claim of a party who would have been in a situation to share, if such a fraud had not been practised upon him, is allowed never to have been directly determined. Till we see whether the facts brings it fairly before the Court, it will be unnecessary to consider what would be the legal effect of such a fraud: It will be sufficient to say generally, that the Court would feel the disposition common to all courts, to defeat the injurious effect of such a fraud, and to take the facts of the case as they would have existed if no such fraud had been interposed. It has been argued, that even if there had been a fraudulent purpose on the part of the actual captor, it would not be sufficient, unless it were proved also to have produced its effect; and that no consequence is shewn to have arisen from it in this instance. But I am of opinion, that if the fraud was proved to have been practised, it must be held to have produced sufficient effect; for the only object of it was to delay the capture till the king's ship was out of sight: No conduct, on the part of the king's ship, was necessary to be induced; the whole was the conduct of the fraudulent ship. The *being in sight* would have been alone sufficient to have established her interest; if the fraud of delay till she was out of sight could be made out, the consequence of losing the opportunity of *being in sight* must be held to have taken place. If the fraud was practised therefore, I should think that nothing farther was necessary to be established on that point.

With respect to the evidence in cases of this nature, it may not be improper to observe, that

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great attention will always be paid to the preparatory examinations of persons on the spot, the crew of the captured ship, who are disinterested witnesses, examined whilst the facts are fresh in their memory, before any disputes have arisen, and before they have had time to embark, either their passions or their interests in the suit: more particularly will the Court be disposed to pay great attention to what is deposed on the 3d interrogatory, which, as I have reason to know, was introduced for the very purpose of giving the Court information on this point, and of preventing such disputes as these.—If it appears from this species of testimony, how the matter really stood, where the proof is of a positive nature, not any mere hearsay or other slight evidence could destroy it; or, even where it is only negative, though not decisive (because it is possible that a ship may have been within sight, though not actually seen by any one of the three witnesses who happened to be selected for those examinations), it will still merit great attention: above all, most certainly, if among the original witnesses, it should happen that one had sworn in the first instance "that there *were no ships* in sight," and came afterwards to say "*there were*," the Court would pay but very little credit to such testimony.

The first person who was examined in this case was the master; and I cannot but think that his negative evidence is a very pregnant negative indeed: He, the commander of a distressed and defenceless ship, anxious to keep out of a *British* port, under suspicions of hostilities, and therefore desirous of avoiding *British* cruisers, could not but have been very much alive to the presence of so large a ship as

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is the short history of the ship. It is pleaded, that after the capture, *Curtis* made a declaration, "that he had postponed the capture in order to let the *Defence* get out of sight." This is undoubtedly a very strong declaration, especially if repeated, against the party himself, and consequently against any person standing on his acts. It imposes a very severe task on the party coming forward to contradict it afterwards; at the same time, he is not absolutely precluded from proving the contrary by an appeal to real facts; and if such facts are proved, then the Court would attend to the true facts, in opposition to the untrue declaration. It has been disputed whether he made any such declaration, and it is true that he denies it upon oath in most decided terms; but I incline to think, that the legal result of the evidence upon the whole establishes, that some such declaration was made, both on the deck of the ship, and afterwards at *Dartmouth*, though possibly mixed up with something of misunderstanding on the part of the hearers and relaters. Supposing that he did make such a declaration, and to the full extent of what the hearers relate, it would be but just to advert a little to the situation of this person at the time: At that moment, this man must have thought, that he had all at once made a large fortune, for he had reason to suppose that his ship was sufficiently commissioned to entitle him to the prize; such a moment would be a moment of intoxication: He might be disposed to shew, that it was not all to be ascribed to accident, that he was indebted for some share to his own sagacity and ma-

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nagement. The fortunate are willing enough so *sacrifice a little to their own net*, and to claim a share of the merit with fortune; and, I think, such a declaration might proceed from a momentary impulse of vanity, without being at all supported by the facts that actually took place. I do not say that this is the first explanation to which the Court would naturally resort: It would undoubtedly at first be disposed to think the declaration was true; but that a man should be absolutely concluded by such a declaration, which at best may be deemed a half drunken declaration, is what I presume no person will seriously maintain: To hold such a declaration conclusive against all evidence of the fact, would be grossly unreasonable; the utmost that can be ascribed to a declaration made as this was, *not on oath*, is, that it must be strongly contradicted by evidence of the fact: The party does not content himself with denying it, but has undertaken to contradict it by an appeal to facts. The other party has attempted to maintain the contrary, and has met him upon that issue; and it will be the duty of the Court to decide between them, by attending to what is proved to have actually passed in the course of the transaction.

The assertion on the part of the *Defence* is, "that the mate of the *Alarm* fraudulently postponed the capture," and the material questions will be, What is the act of fraud applied? and at what period is it supposed to have taken place? It is not asserted that the *Alarm* did not go to sea as soon as possible after *Curtis* received the news,—that is not to be supposed; he put to sea about twelve o'clock the same night, and left *Dartmouth* harbour in pursuit

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and absolutely out of the reach of the principle on which *the being in sight* is admitted to constitute an interest of joint capture; but *this* may be safely affirmed, that if the court was to pronounce for such a claim, on such evidence, it would be in all respects a very extreme case indeed. The allegation is laid in very different terms, pleading, "that they *were distinctly in view*," yet no other person is brought from amongst the whole crew to say, that he saw her; and this man deposes only, "that he saw her from the mast head." Two other persons speak to opinion, "that she must have been seen, &c." These amount to nothing but conjectures and inference, and must be dismissed. From the captured ship, one boy is produced, who says, "that he recollects to have seen a three-masted vessel from the deck." It is certainly a little extraordinary that, if the *Defence* had been an object of terror only one day before, this boy should have been the only witness who was making any observation, or who got any sight of her, at this time. Here again, I must say, that if I was to pronounce for a joint capture, on this evidence, it would establish a very extreme case indeed; extreme as well in the evidence as in the fact; There is no journal nor log book produced to shew what was the rate of sailing; although it is admitted, that the *Defence* was making her way *up* the Channel as fast as she could, in pursuance of orders she had received; and this very reason is given for not having stopped to examine this vessel in question.

Thus the case is left on the part of the asserted joint captors, this being the whole evidence produced. On this proof it is impossible to say, that

they have performed the task which the law imposes on them, of bringing unequivocal, direct, and unsuspicious evidence of their claim. But farther, from the evidence of persons entirely neutral in this matter, as to any bias of interest, I should not scruple to say, not only that the *Defence* is *not proved to have been in sight*, but that on the contrary, it is proved, on the best legal consideration that I can give it, *that she was not in sight* at the time of capture.

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Then, we come to the second ground, "That if she was not in sight, it was owing to a fraudulent postponement of the act of capture." The first evidence on this point that is addressed to the attention of the Court is, the declaration of the actual captor himself, Mr. *Curtis*, the mate of the *Alarm*: It appears from the evidence of *Green*, a fisherman, "that on the day before, he had gone on board the *Robert*, and found her in a disabled state, that he had advised the master to go into *Dartmouth*, suspecting there was valuable *Dutch* property on board; that he afterwards made the best of his way to *Brixham*, and called on the mate of the revenue cutter to give him the information;" that the mate went immediately to *Dartmouth*, where the cutter was lying, and sailed the next morning in quest of this vessel; which in the mean time, finding her difficulties to increase, had taken a pilot on board to carry her into *Dartmouth*; but was at that time, owing to unfavourable winds, steering for *Torbay* to procure farther assistance. It is admitted, that when *Green* left her she was steering up the Channel, and that she altered her course afterwards for *Torbay*, being unable to make the port of *Dartmouth*. This

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the *Defence was*; her appearance could not but have made a strong impression on his mind, and an impression that would not, in all probability, have immediately escaped his recollection: he was examined three days after the event, and although *he speaks of fishing-boats, sloops, &c.* as *being in sight*, he makes no mention of any square rigged vessel, and seems to have observed no such thing. The same remark applies to the second witness—as to the third, I do him no injustice, when I say, that I think his evidence must be laid entirely out of the question. This witness *Lohman* comes now to depose, on the allegation given in on the part of the *Defence*, “that she was in sight;” yet, on his preparatory examination, (speaking with minute particularity as to *sloops* and *brigs, &c.*) he says nothing of the *Defence*, as being in sight at the time of capture; although he now describes her as a vessel seen by them the day before, and as having occasioned a good deal of terror and apprehension amongst them:—his later evidence must stand totally rejected.

This is the amount of the preparatory examinations, the simplest and most unimpeached evidence that can be produced on a question of this nature: The effect of it is, that the *Defence was not* in sight. But an allegation has been given in, after an interval of twelve months from the time of capture. I lay no blame on any party for not bringing it in earlier: It happens that the parties who are to give the instructions are abroad on foreign service; yet I must observe, how desirable it is, that allegations of this sort should be brought forward as speedily as possible; for, where witnesses come to be

examined after a distance of two or three years, when facts are not distinctly remembered, or are mixed up, perhaps, with the result of all the eager and interested and gossiping conversations, that usually pass in sea-port towns on such subjects : it is not too much to say, that no great reliance can be placed on their representations, which are often inconsistent in such a degree, as to be totally irreconcileable upon any honest construction. The present case furnishes an instance, in which it is admitted, that many circumstances are related with such a diversity, that no attention can possibly discover which is to be credited, and the Court is compelled to determine upon general views of the case, and upon such facts as are mutually admitted. One witness, *Bewick*, is brought forward, from the ship, in whose favour the claim of joint capture is given ; and although he has released his interest, it must not be forgotten, that such witnesses usually see with sharp eyes, and recollect with prompt memories in favour of their own ship : This description of men are by no means particularly exempt from an infirmity common to all mankind. I believe there is no case in which the Courts have decided in favour of a joint captor on such evidence alone : In the case of the *Twoe Gesusters* it was laid down by Lord *Camden*, that no such testimony alone could ever be permitted to establish it.

This witness says, "that at two the *Defence* was in sight *from the mast head*." I am not aware of any one instance in which the Court has pronounced for a joint capture, on *being in sight only from the mast head*; I do not say that such a case would be entirely

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of the ship. Now, if any general fraud for the purpose of misleading a joint capture had been intended, what is the form which it must have assumed? that of keeping near the prize, *pari passu*, hovering about her, and creating no suspicion in the mind of the *Defence*; and so it is represented in the allegation:—It would on the contrary have been most unnatural for her to have sailed wide of the prize, and to have run the danger of seeing her get into *Torbay*, where she would have been seized by other vessels: Accordingly, *Bewick*, the witness examined from the *Defence*, describes the *Alarm* “to have hovered about;” he says “that he saw the *Alarm* sail past the *Robert*, a small distance to the southward, and afterwards hove to, that he, knowing the *Alarm* to be a revenue cutter, supposed she was proceeding to search the *Robert*, &c.” But is this the state of the case, as the Counsel themselves have been compelled by the evidence, to represent it? Is it in any way proved that “she hovered about?” on the contrary, it appears, and is admitted without reserve, that on coming out in the morning, the *Alarm* pursued the *Defence* instead of the *Robert*; and that it was not till after some time, that she perceived the mistake, and tacked about in pursuit of the prize. The whole of the matter of fraud then is reduced to one question, Whether this was a *bond fide* act on the part of the *Alarm*? whether she pursued the *Defence* under an honest mistake, or with a fraudulent intention? But here let me ask, is this a case at all like the case represented in the allegation? It is there pleaded in the 3d article, “That *Curtis*, in order to deceive the *Defence* into an opinion that the *Robert*

was a friend, cunningly restrained from making the seizure at such time, and sailed past the *Robert* at a small distance and brought to for upwards of two hours: Is this a case of hovering about, and keeping company? by no means: The only argument that the evidence has afforded has been, that the *pretended* mistake was committed fraudulently, and for the purpose of gaining time: I have already said, that it would be extremely improbable that a ship going out to make a capture of such value, should leave her prize in this manner, from choice or design, and run the risk of seeing her get into *Torbay*; she would have kept near and have pounced upon her at a proper moment; and again, if the intention was to suffer the *Defence* to proceed up the Channel without taking notice of any thing passing behind her, and so to elongate her distance as to be out of sight at the time of capture, could a more inconsistent measure have been employed than that of engaging in the pursuit of her, and thereby calling her attention back by so singular an appearance? What evidence is there to shew, that conduct, so unnatural to be pursued, was *actually pursued* and from fraudulent motives?

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The only argument that is urged is drawn from the improbability of such a mistake. It is said "that the *Robert* and the *Defence* could not be mistaken for each other." But we are to remember, that the ship for which they were looking was of a large size, suited to an *East India* voyage, and nothing diminished, I dare say, by the description which the fisherman had given of her. She had been left by him the day before, sailing up the Channel, the course in which

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the *Defence* was then going. In the depth of winter, as this was in *January*, when the weather is hazy, and when ships are apt to *loom*, as it is termed, *very large*, that such a mistake should have been made at eight o'clock in the morning, when the *Alarm* came out, is not at all improbable. Certainly, if they had gone on till they came close, such a mistake would be entitled to little credit. But it was not so; they pursued till they came within seven or eight miles, and then, discovering the mistake, they were at a loss, and in doubt in what part of the horizon they were to look for the prize, and it was some time before they recovered her. Supposing all this pursuit of the *Defence* to have been a fraud, is it to be taken as the fraud of *Curtis* alone, or of the whole crew? If of *Curtis* alone, it could hardly be but that the rest of the crew would have remonstrated against such a wild chace, inconsistent with the interest they all had in view! It must have been observed to him, "You are going out of the way; the prize is in another quarter." Or, if it was not the project of this man alone; it must involve all the principal persons on board in the same fraud, and also in perjury, as they all swear positively they were pursuing a fair intention; the same account is given, also, by other disinterested witnesses; the pilot and persons observing this transaction from signal houses on shore, all support the same story. It is to be remarked also, that their own witness, *Lohman*, admits the possibility of a mistake; and even the boy *Forster*, for he says, "that he saw the *Defence* the day before; but whether she was a ship of war or not, he could not tell."

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How is it possible to say upon this evidence that the imputation of fraud is made out? The imputed fraud is of one kind, and the fraud attempted to be proved by the witnesses is of another, totally inconsistent with it. The fraud imputed is that of hovering round and keeping close to the prize, till the *Defence* had got out of sight; but the fraud attempted to be proved is, that of a fraudulent desertion of the prize, and a fraudulent pursuit of the *Defence*; to the former representation one witness alone speaks, *Bewieke*, but all the other witnesses on both sides so directly contradict him, that the Counsel have been compelled to abandon his testimony as irreconcileable with the fact, and founded in some misapprehension on his part. They have been compelled in effect to admit, that if the fraudulent pursuit of the *Defence* cannot be maintained, the imputation of fraud falls to the ground; for they do not suggest that the *Alarm*, after quitting that pursuit, did not *bond fide* pursue the prize, and take possession of her as soon as she conveniently could. Now it appears to me, *independently of all evidence*, that the case of fraud as thus represented, is on every account unnatural and incredible; and that, *upon the evidence*, it is contradicted by all the testimony on which the Court can safely rely. If it be true, every witness on the land must have grossly misunderstood it, and every witness on board the *Alarm* must be involved in the guilt of a deliberate perjury.

If I am right in this view of the case, the declaration made by the mate (if made, and in the extent which is suggested) is contradicted by the facts upon the fullest examination of them.. At the same time,

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I cannot but think that this idle declaration has furnished a very sufficient *causa litigandi*, and shall therefore direct the whole expense of the proceedings, on the part of the claimant, to be defrayed out of the proceeds of the prize remaining in the Court.

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Compensation in
Value—Mode
of estimating
10 per cent. on
the invoice price
does not include
the charge of
freight—the ship
and cargo be-
longing to the
same person.

THE LUCY, TREADWELL Master.

THIS was a case of a ship and cargo which had been taken in port, at the capture of *Martinique*, and condemned in a Vice Admiralty Court erected there by the commanders in the *West Indies*, under a misapprehension that they possessed an authority to erect such Courts.

On proceedings instituted against the captors to proceed to adjudication in the High Court of Admiralty, the former proceedings in this pretended Court being nullities, the ship and cargo claimed for the same person were directed to be restored *in value*. On a reference to the Registrar and merchants to ascertain the value, they had taken the invoice prices, and allowed upon it a profit of ten *per cent.* A claim for freight on the part of the ship had been disallowed by them.

Laurence now prayed that the Court would direct the report to be amended, so as to add an allowance of freight.

On the other side, the King's Advocate contended—
That the allowance of ten *per cent.* was intended to cover all charges.

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The Registrar explained the ground on which he and the merchants had proceeded, viz. That as the cargo had actually arrived at *Martinique*, they looked first for some means of ascertaining the actual value* there; that not being able to obtain any documents by which they might establish that fact, they had been obliged to take the invoice price, and allow a profit of ten *per cent.* as an ordinary mercantile profit: That the claimant had not proved before them that he had actually paid freight; on that account they did not think themselves at liberty to allow it, but had advised an application to be made to the Court.

Some reference having been made to the *St. Eustatius* cases of the last war, the Registrar said he did not recollect that any question arose in them respecting ships, as they were chiefly cases of produce† captured in store-houses.

* It was said in this case, that the practice of giving ten *per cent.* originated in the cases of corn and other cargoes taken and paid for by Government.

† In those cases the account of sales were produced, and it was strongly argued in the Court of Appeal, that the claimants were entitled to an allowance of profit on those sales. But the Court held, that the sales being produced, the claimant must be content with the proceeds, unless the fairness of the sales could be impeached. The prize act for the present war, sect. 32, contains the following express direction on that point, for sales under the authority of a Court of Justice: That in case the sentence or interlocutory decree, having the force of a definitive sentence of such Court of Admiralty or Vice Admiralty, shall be

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Court—My opinion is, that if ten *per cent.* is not more than a fair mercantile profit on the cargo, the claimant is farther entitled to be considered in the character of owner of the ship. He is entitled to his profits in that character as well as in the character of owner of the cargo. He has not actually paid freight, because he unites both characters in himself. If the freight was paid separately, where the owner of the ship was not the owner of the cargo, it is equally due where the one person is owner of both.

The King's Advocate prayed, that as it was a question in which a great number of cases and a very considerable amount of property were involved, it might be allowed to stand over for farther consideration.

On the 21st Feb. 1801, the matter being moved again, the King's Advocate said, that after the intimation which had been given of the opinion of the Court, he did not, on consideration, think that he could oppose the motion.

Freight directed to be added to the report, as a general rule to govern all similar cases.

finally reversed after sale of any ship or goods, pursuant to the directions in this act contained, the net proceeds of such sale, after payment of all expenses attending the same, shall be deemed and taken to be the full value of such ship and goods; and that the party or parties appellate, and their securities, shall not be answerable for the value beyond the amount of such net proceeds, unless it shall appear that such sale was made fraudulently, or without due care,

THE ANNA MARIA, HILEEBRANDT Master.

Dec. 9th,
1800.

THIS was a case on admission of an allegation of joint capture, given on the part of His Majesty's ship the *Sandwich*, averring the capture to have been made by His Majesty's hired armed tender the *Mi-
nerva*, at the time of capture attached to, and in the service of, the said ship the *Sandwich*. It was alleged also, that at the time of capture, lieutenant *Pamp*, the commander of the said tender was a lieutenant of the *Sandwich*, and was acting under the command of the *Sandwich* in the chasing and capturing, by virtue whereof His Majesty's ship the *Sandwich* was aiding and assisting in such capture, and entitled to share in the prize.

Allegation of joint capture, on the part of the *Sandwich*, averring that the actual captor, a hired armed tender, was attached to the *Sandwich*, admitted—Observation respecting the proof necessary to support the averment, from the orders of the Admiralty, &c.

The King's Advocate said, there were many private armed ships of war hired by His Majesty's government, and employed under His Majesty's officers; that prizes made by them were usually condemned to them as to commissioned captors; that this was a vessel of that description, sent on the present service by the officer of His Majesty's ship the *Sandwich*.—The ship and cargo had been condemned 26th *July*, 1796, as taken by the tender, and that sentence, on the appeal of the claimant, was affirmed by the Lords, *April 1799*. An appearance was given on the part of the *Sandwich*, as joint captor, on the 13th *May*, 1800: When this allegation was first brought before the Court, it was directed to stand over for the purpose of procuring information respecting the orders under which this vessel was so attached. It was now

CASES DETERMINED IN THE

The
ANNA MARIA.

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brought forward again; when the King's Advocate said, it did not appear that there were any orders by which the tender was attached to this particular ship, the *Sandwich*.

Arnold—We have not been able to procure the orders, but it must be in the knowledge of the parties.

Court—I should be very much inclined to hold, that in order to support the claim effectually on behalf of this ship, some orders must be produced to shew in what manner the actual captor was attached to the *Sandwich*. If she was attached as a tender, it must have been in consequence of some orders in writing. Unless such orders can be produced, it does not appear that the fact can be properly established, but the fact being averred, I must admit the allegation, leaving it to the party to consider, upon this observation, what proof will be necessary to sustain it.

Allegation admitted.

Jan. 21,
1801.

THE GEORGE, DUNKIN Master.

(Instance Court.)

Motion in the Instance Court to arrest a ship taken at Curaçoa, never brought to adjudication, rejected.—Proceedings in the Prize Court directed to call on the captor to proceed to adjudication.

IN this case, *Laurence* moved to arrest the ship on the part of the owner, on a suggestion that the ship had been taken prize in the *West Indies*, at the capture of *Curaçoa*, and sent to *Europe* with dispatches to government, without having been brought to adjudication.

The King's Advocate said, there was no instance in which the Court had granted a warrant in a case of this nature, where the ship was liable to be proceeded against as a prize; that the proper mode would be to take out a monition against the captors to proceed to adjudication.

The
GEORGE.

Jan. 21st,
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Court—I am disposed to think that this motion is unnecessary. If a return was to be made by government, in whose hands it appears the ship is, that they held it as agent for the captor; the proceedings must then take the common form of a proceeding in prize. Some reference has been had to the case of the *General Waltersdorf* (1st Adm. Rep. p. 348), but in that case the Court said, you must first proceed against the captors.

If, in the present instance, the ship was in the hands of a foreigner, or in danger of being sent away, the Court would be called upon to exert its utmost diligence; as the matter now stands, there is no necessity for this motion, and no end will be effected by it.

Motion rejected.

THE SISTERS, TUBBS Master.

Feb. 19th,
1801.

THIS was a case on the admission of an allegation on the part of *Robert Charnock*, proceeding against the ship in a suit of possession. An objection was taken that the manner in which the title was avowed, was not sufficiently expressed.

Averment of
property in cause
of possession—
objected, that it
was insufficient
Objection over-
ruled.

The
Sister.

Feb. 17th,
1801.

On the other side, the King's Advocate and Swabey contended that the allegation went as far as was necessary or proper; that it exhibited the instrument of purchase, and expressly averred, "that the owner has never sold or transferred the possession;" and then calls on the other party, who has got into possession, to prove his title, and shew cause why he should not be dispossessed.

Court—It appears that the averment is sufficient to entitle the allegation to admission. It is a case in which Mr. R. Charnock has taken out a warrant of possession; he states the purchase made by him, and proceeds to say, "that ever since the said ship, her tackle, &c. have been the true and legal property of the said R. Charnock," the possession is withheld from him; but on what grounds is not yet at all disclosed. It may be that it is retained by the master, on some squabble with him, involving no question of property. If it should turn out that a question of property is involved, it will be then time enough for the Court to consider whether it can interpose. At present nothing appears. I think the title is sufficiently averred to procure admission for the allegation. It will be for the party proceeded against to set out the grounds on which he resists the demand of a party claiming as proprietor.

Allegation admitted,

THE HOPE, HORNCastle Master.

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(Instance Court.)

THIS was the case of a protest entered on the part of the *East India Company* to a monition calling upon them to shew cause why salvage should not be decreed to the crew of His Majesty's ship the *Harpy*, on a suggestion that the *Hope* was stranded and in great distress; and that the *Harpy* had assisted her, and taken on board some chests of bullion, &c. for the purpose of lightening the ship, and for the preservation of the treasure.

Salvage: Monition calling on the owner to shew cause why salvage was not due: Objection that civil proceedings on salvage could be instituted in rem only, and not against the owner, overruled.

In support of the protest; *Swabey* objected that the only mode of proceeding for salvage, in the Instance Court, was by a warrant of arrest of the ship; that there was no precedent in the books of a monition against the proprietor personally to shew cause in the first instance.

Court—I am not disposed to sustain the objection that has been taken to the legal mode of proceeding; but the substance of this claim of merit, on the part of the *Harpy*, is of such a nature that it seems to be a matter more fit for private remuneration than to be made the subject of a suit of salvage. The nature and extent of the service performed, presents a very fit occasion for the gratitude of so considerable a society of merchants as the *East India Company* to express itself in some sort of honorary acknowledgment to the King's officer who performed it. I think

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it would be difficult to make more of it; possibly on this opinion having been expressed, the matter may proceed no further, otherwise I must consider the objections taken against the mode of proceeding, though, as at present advised, indisposed to sustain them.

20th June, 1801. In the *Trelawney, Lake*, 20th June, 1801, which was a case of salvage of a slave ship on the coast of Africa, afterwards given up to the master for the convenience of proceeding on the voyage. The proceedings had been instituted in the same manner, by a monition, calling on the owners to shew cause why salvage should not be decreed. The owners appeared under protest, and in support of the protest, *Arnold and Swabey* took a similar objection to that taken in the *Hope*; "that a suit of salvage, in a case civil and maritime, should commence by an arrest of the ship, as being a proceeding *in rem*; that in the articles 18th Feb. 1633, it was particularly expressed, "that if suit shall be in the Court of Admiralty, for building, amending, saving, or necessary victualling the ship, against the ship, and not against any party by name, but such, as for his interest, makes himself a party, no prohibition shall be granted, though this be done within the realm." From this it was inferred, that for saving the ship, the suit should originate against the ship, and not against the owner.

On the other side, the King's Advocate and Laurence—The owners of this property have received great benefit from the service of the salvors, in this case will not be denied. In strictness, the salvors had a right to bring home the vessel to ground a demand of salvage on proceedings against her; because they have waived that right for the farther convenience of the owners, it is endeavoured to turn them round, by objecting to the form of proceeding; the effect of which would certainly be to make all other salvors very cautious how they depart from their extreme right in future instances. It is said that our proceedings recite, and suppose an action *in rem* depending; and that it is by this fiction only that the monition is introduced. If that were the case, such a fiction would be very sustainable: but the truth is not as it has

been represented. The old practice has always been, in the first instance, against the person; and several of the first chapters of *Clarke's Praxis* direct the proceedings to be against the person.

Court—As the objection has been pressed, I shall reserve this matter for farther consideration. At present it may be sufficient to say that the Court will be extremely unwilling to hold, that because a salvor has chosen to proceed in the manner most favourable and most accommodating to the other party, he shall be deprived of substantial redress in this Court.

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It is a most ungracious objection that is founded upon an act of the salvors, done at the request and for the convenience of the party benefited, and as it may fairly be presumed, under a tacit reservation of all rights.

On the 31st July, the Court directed the protest to be overruled, and decreed a monition against the owners to shew cause.

THE FRANKLIN, SEGERBRATH Master.

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THIS was a case of a *Prussian* ship going with a cargo of hemp and iron from *Lubeck*, ostensibly, to *Lisbon*, but actually, as it was inferred from the place of capture and course of the voyage,* to *Bilboa*.

Contraband with false destination affects the ship as well as the cargo.—Ancient practice: Relaxation in favour of fair proceedings, on the part of the neutral merchant.

For the captors, the King's Advocate and Adams argued—That from the situation of this vessel it was evident she was not going to *Lisbon*, but to a Spanish port, with a false destination to *Lisbon*; that the penalty for carrying contraband articles of war to the enemy had anciently affected the ship as well as the cargo; that whatever relaxations might have taken

* She was taken about three miles off *St. Andero*.

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place in this respect, they did not apply to cases attended with the aggravating circumstance of a false destination ; a conduct which made the ship an active partaker in the hostile purpose of supplying the enemy with stores of war, and deprived the other belligerent of the right of pre-emption. It therefore justly called for some additional penalty to distinguish it from the cases of ships going with an avowed destination ; that in those cases a loss of freight ensued, and that the only additional penalty that could be inflicted would be to return to the ancient rule of law in such cases, and hold the ship herself liable to confiscation.

For the claimant, Arnold denied the sufficiency of the inferences, by which it was attempted to prove that the ship was actually going on any other destination than what was expressed in all her papers, and confirmed by the testimony of the master, *viz.* to *Lisbon*. It was farther contended on the point of law, that if the fact were so, there was no reason to resort to greater severity than had been practised in late cases in the Court of Admiralty of this country ; that in the *Sarah Christina* the ship was taken actually going into *Cherbourg*, though all the papers purported a destination to *Cagliari*, yet the Court of Admiralty did not proceed in that case to inflict any greater penalty on the ship than the loss of freight. (1st Adm. Rep. p. 237.)

JUDGMENT.

Sir *W. Scott*—This is the case of a ship claimed as the property of *Prussian* subjects, and sufficiently

proved to belong to them. The charter-party made with persons at *Hamburg*, engages her to go from *Lubeck* to *Lisbon*. If that was the real destination, there could be no doubt that the owner would be entitled to a restitution. But a question has arisen on that fact from the nature of her cargo, and the place in which she was taken. Her cargo consists of several articles directly contraband, if going to the enemy, and not protected by the favourable considerations which are to a certain degree, and in some known instances, applied to the goods of persons exporting the native commodities of their country.—The other articles, though not so distinctly contraband, are such as are of great use in naval equipment, and might subject the ship to some penal inconvenience, if going to a hostile port.

The destination, therefore, is the principal fact in this case. The ship was taken out of her proper course, and in a direct course towards one of the Spanish ports in the bay of *Biscay*, on this side of *Cape Finisterre*. I have had frequent occasion to observe, that it is very difficult to detect a fraud of this species in the particular instances. Pretences and excuses are always resorted to, the fallacy of which can seldom be completely exposed; and, therefore, without undertaking the task of exposing them in the particular case, the Court has been induced (and I hope not unwarrantably) to hold generally in each case, that the certain fact shall prevail over the dubious explanations.

This vessel was going, as it is asserted, to the south of *Cape Finisterre*, to *Lisbon*, from the *British* channel. On such a voyage, the great object would be, as

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every person must observe upon looking at the map, without the smallest degree of nautical experience, to keep far enough out to weather *Cape Finisterre*, and then stand to the east; instead of that, this ship had ingulphed herself deep in the bay of *Biscay*, and was steering eastward directly for the coast of *Spain*. By keeping to the eastward on such a voyage, the ship would have had two or three headlands to weather, and would have been in want of two or three winds for that purpose. It is not immaterial to observe, that this man had navigated in these seas before, and cannot plead inexperience. It is likewise obvious, that on a voyage to *Lisbon* there would have been particular reason for more than ordinary caution to avoid the coast of *Spain*; considering the ambiguous state of affairs between *Spain* and *Portugal*, we may reasonably suppose such a cargo as this going to *Lisbon* at this time, would not have been considered as a perfectly innocent cargo by a *Spanish* cruiser. A case has seldom occurred in which a master, found out of his course, did not attempt to set up some excuse: In the present case no such attempt is made. He admits his sailing towards the *Spanish* coast; yet he does not resort to the winds, or any other cause, for an apology. The month of *November* in the last year was particularly mild; I do not find in the log book any mention of adverse winds. One witness, indeed, says, "that they were steering to the *Spanish* coast with very thick weather;" but not that they were ignorant of their situation. As the evidence comes from a place where the Court has had occasion to remark that the depositions have not always been taken with proper correctness, if the

master had offered an affidavit to shew that he had tendered any explanation to the commissioners, and that they had omitted to take it down, I would have given him the opportunity of explaining himself here; but no explanation of that kind is suggested: I observe too, that although the master says, "the cargo was to be delivered at *Lisbon*," he speaks in a very infirm manner to that fact, by a bare reference to his papers. He is the person who made the charter party, the man making the contract, and directing the actual course of the vessel; from him, therefore, might be expected a positive and distinct testimony, instead of a mere opinion founded only on the contents of his papers, which, unless his own knowledge of their truth concurred, are no sufficient foundation for his belief. I am satisfied on the facts of this case, that it was the plan of this voyage to carry the ship fraudulently, under a false destination, into a *Spanish* port; no explanation having been offered, the present evidence must be taken to be conclusive. The consequence will be, that this fraudulent conduct on the parts of those who are concerned in the ship, will justly subject her to confiscation. Anciently,* the

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* *Bynkershoek* and *Heineccius* both agree that on principle the penalty ought to attach equally on the ship, as well as on the cargo. "Si scientibus dominis contrabanda ad hostes deferrent, et nisi pacta impediunt." Vide supra, vol. i. p. 288. And so the ancient practice appears to have been, vide *Collect. Marit.* p. 58. and with regard to land wars also, and carriage by land as well as by sea. *Boerius Decis. Burdegal.* 178. "Quare omnia tam prohibita A. D. 1578.
quam licita, sive sunt deferentis sive non confiscantur, et etiam navis, vel animal etiam, vel coffri sive bahuti, cum quibus res

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carrying of contraband, did in ordinary cases affect the ship; and although a relaxation has taken place,

deferuntur, et ita habetur in ord. Car. 8th. It is afterwards added, “ Si res aut navis vel animal esset alterius ignorantis, tunc non confiscatur;” and on this point a reference is made to the *Roman* code, from whence the writers on the laws of nations have loved to draw all their reasonings, and sometimes by very loose analogy. The text in question, however, was sufficiently opposite, as the article began by considering the prohibition “ hostibus venundari cōtem ferro subagendo necessariam, et ferrum et frumentum et sales;” and goes on to treat of the forfeiture attending carriage of prohibited articles in general. “ Dominus navis si illicite aliquid in navi vel ipse vel vectores imposuerint, navis quoque fisco vendicatur. Quod si absente domino vel a magistro vel gubernatore, aut proseta nautave aliquo id factum sit, ipsi quidem capite puniantur commissis mercibus, navis autem domino restituitur.” D. L. 39. c. 4. § 11.

Grotius does not particularly discuss the case of the ship carrying contraband, but he says generally, that the whole subject of contraband had been much agitated before his time. “ De ea re acriter certatum scimus, cum alii belli rigorem, alii commerciorum libertatem defendenter.” L. 3. c. I. § 5. Soon after his time a relaxation began to be introduced into treaties. The first treaty, in which an exception was introduced in favour of the ship, was in 1650, between *Spain* and *Holland*, in which the terms are general, and admit of no particular observation. The second was the treaty between *France* and the *Hans Towns*, 10th May, 1655, in which the terms are very special, and point distinctly to the principle on which the relaxation was founded, “ S'il se trouvoit des dites contrebandes sur des vaisseaux des dits habitans, chargés à cueillette [i. e. amas de différentes marchandises qu'un maître cherche et recoit de divers particuliers, pour faire le chargement de son vaissaux. Expl. de termes de Marines,) a cueillette en un ou plusieurs lieux, elles seront confisquées purement et simplement, sans que les autres marchandises, ny les vaisseaux le pussent être; et celui qui les aura chargées, sera tenu à tous les dépens, dommages et intérêts soufferts par raison de ce par les intéressés aux vaisseaux.”

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it is a relaxation, the benefit of which can only be claimed by fair cases. The aggravation of fraud justifies additional penalties; and the right of pre-emption, which would otherwise be defeated, must be secured by them. This is the opinion which on principle I should entertain on this subject, but I wish to consider the authority of cases.

This was evidently, in its terms, a relaxation for cases only, in which the owner of the vessel might be supposed to be a stranger to the transaction. In the latter part of that century, the stipulation in treaties became more general: But in a book, which, though not of direct legal authority, is very likely to contain a true account of the general practice of those times, published at the very beginning of the eighteenth century, is the following passage: "If part of a cargo taken by a privateer be prohibited goods, and the other part be not prohibited, but such as according to the necessity of the war shall be so deemed, that may draw on a consequential condemnation of the ship as well as the lading. If part of the lading is prohibited, and the other part is merely for pleasure, the former only shall be adjudged to be prize, and the ship and the rest of the cargo be discharged; but if all the lading be contraband goods, both ship and goods may be made prize." P. 472. In the same spirit, the later ordinances of France, notwithstanding former relaxations, have declared, that the ship should be deemed prize when three-fourths of the cargo was of a contraband nature. *Code des Prises*, vol. 2. p. 672. These instances may induce us to suppose, that the relaxation has been directed, in its practical application, as well as in its origin, only to such cases as afford a presumption, that the owner was innocent, or the master deceived. Where the owner is himself privy to the transaction, or where his agent interposes so actively in the fraud as to consent to give additional cover to it by sailing with false papers, all pretence of ignorance or innocence is precluded; and there seems to be no farther ground, consistent with equity and good sense, on which the relaxation in favour of the ship can any longer be supposed to exist.

Treatise of Sea
Laws.

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I have deliberated upon this case, and desire it to be considered as the settled rule of law received by this Court, that the carriage of contraband with a false destination will work a condemnation of the ship as well as the cargo. In the earlier case of the *Sarah Christina*, the Court, from a favourable regard to some particular circumstances, practised an indulgence in restoring the ship, but without freight and expenses, declaring it at the time to be an indulgence hardly reconcileable to just principle. Having now maturely and upon discussion considered the general point, I am decidedly of opinion, that confiscation of the vessel is the legal result of the carriage of contraband under a false destination.

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Revenue cutters
entitled to sal-
vage on recap-
ture, as private
ships of war.

THE HELEN, MARSHALL Master.

THIS was a question as to the quantum of salvage due on the recapture of a *British* ship and cargo, by a revenue cutter, having a letter of marque.

Supra p.

On the part of the recaptors, the King's Advocate—
These ships are to be considered as private ships of war, and as such are entitled to a sixth. It has been held in one case, the *Robert*, where the capturing ship, the *Alarm*, was a revenue cutter bearing a letter of marque, but not having the commander on board, that no prize vested in the ship's company under the terms of commission. They were subjected in that instance to the same rules as private ships of war in that respect, and are therefore entitled to be considered

altogether in that character. It may be said, they are equipped at the public expense, but not for these purposes. They are not king's ships for military purposes, as they take no benefit from prize, except by virtue of their letter of marque. In two cases, the *Clara*, *Norberg*, June, 1799, and the *Werwagting*, June, 1800, an eighth only was given; but they were cases of recapture of neutral ships, and consequently not coming under the prize act. In those cases, the Court expressly qualified its decree with that observation; noticing that nothing was determined by them on the general question, whenever it should fairly arise on the recapture of *British* property, under the act of parliament,

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On the other side, Swabey—It is a very ancient rule of the Admiralty, that ships in the public service take less benefit in prize than ships of private persons; which are fitted out at their own expense, and frequently, even in cases of the most successful capture, lose the object of their voyage. It is a principle highly reasonable, that some distinction should be made in the quantum of reward; and it will be in the recollection of the Court, that in some letters of Sir *Charles Hedges* that are still extant on these matters, it mentioned as a general principle of salvage, that smaller reward should be given where the recaptors are not navigating at the expense of the owner: Such is the condition of the ship in question—No expense falls on the owners, she is hired and equipped for the public service, and the very commission she bears is taken out either by the King's proctor or the proctor of the Admiralty at the public ex-

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pense :* So far are they from being considered in the general character of private ships of war, that the 10th section of the prize acts expressly reserves all the interest of prize taken by these ships to the crown, making it distributable, not according to the general rule, but at the discretion of the Crown.

JUDGMENT.

Sir W. Scott—This is the case of a ship, taken by the French and retaken by a revenue cutter. The question is, Whether she is to pay a sixth for salvage, as a private ship of war, or an eighth as to a King's ship? The question is, I say, to determine to which of these descriptions of vessels the recapturing ship belongs, as far as the necessity of the present case call for a decision on that point, and no farther. We all know that in recapture no commission is necessary to vest a salvage interest in the recaptors: It is the duty of every subject of the King to assist his fellow subjects in war, and to retake their property in the possession of the enemy; no commission is necessary to give a person so employed a title to the reward, which the policy of the law allots to that meritorious act of duty.

The recapturing ship is a revenue cutter, a custom-house vessel, with a letter of marque. The section of the prize act directs: "That nothing in this act contained shall extend or be construed to extend to entitle any person or persons to any interest in such ships or vessels, goods or merchandizes, as may be cap-

* The King's Advocate said, that though the commission was paid for by the custom-house in the first instance, it was afterwards charged to the account of the proprietor.

tured by any private ships or vessels of war belonging to His Majesty's commissioners of customs or excise; but that the same ships or vessels, goods or merchandizes so captured, shall belong to His Majesty, and be applied and disposed of in such manner as His Majesty under his sign manuel shall order and direct, after legal adjudication thereof." I remember perfectly well, what was the reason for the introduction of this clause. These vessels used occasionally, in former wars, to provide themselves with letters of marque at their own expense. This was found in some degree inconvenient to the proper service in which they were employed by government; instead of looking after petty smugglers, under their public commission, they were looking after rich vessels of the enemy, under their letter of marque; which entitled them to the whole of the benefit of such prizes, though they had been fitted out, manned, and armed, not at the expense of the owners, but at the expense of the government, which was, thus to a certain degree defrauded of their proper services. On the breaking out of the present war, it was deemed adviseable to annoy the enemy's commerce upon their own coasts, and to intercept the return of their vessels into their own ports; and it was thought that these vessels were eminently qualified for this service, from their intimate acquaintance with the coasts of *France*, and their experience in that navigation. The government, therefore, directed them to be provided with letters of marque, for the purpose of enabling them to act hostilely in the service required; but at the same time to prevent their acting without controul, and with injury to their other public duty,

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reserved the distribution of all prizes taken by these vessels, to its own discretion. Besides these purposes of public policy which this arrangement answered, it had the additional advantage of providing a sort of general fund, out of which government might reward at its discretion, such of them as had cruised with merit, but without success.

So stands the matter with respect to prizes taken under their letter of marque; but it has been already observed, that no letter of marque is required to enable a vessel to make a recapture, or to entitle her to an interest of salvage. A recapture is not made at all under that authority, though they could not take a prize under any other. In the case of the *Robert*, the captors being one of these ship's, was considered on the footing of a private ship of war; and such appears to be their proper character, where they are not otherwise described by the act of parliament, and where the purpose of the act does not interfere. The only point on which it does interfere, is with respect to captures made under these cases. The provision of the act is, that the ship's goods, the proceeds of merchandize *so captured* shall be reserved to His Majesty, &c. The act does not necessarily extend to cases of recapture, and I am not disposed to carry the analogy farther than the words of the act direct. For all the purposes of this transaction, these ships are to be considered as if no such act had ever been made: If they would have been entitled to one sixth, supposing the act had never existed, I see nothing in it which should in any manner alter the proportion: It is true they are armed at the public expense, but for very different purposes, and no dif-

ference has been made in former wars on that account where these vessels were concerned. The interest which is reserved in the 10th section of the prize act, is such at results from the commission, and not such as is in no way derived from it.

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Salvage decreed, one sixth.

After the sentence had been delivered, it was mentioned that there had been a decision of the Court, 10th May, 1798, in the case of the *Active, Smith*, retaken by the *Lively* revenue cutter, in which the Court decreed, that a revenue cutter should take an eighth salvage.

Court—I should feel great reluctance in deciding contrary to the declared opinion of my predecessor; but as this precedent was not mentioned till I had given my reasons for the opinion I have just expressed, as it is not particularly stated, and is not described to have been decided upon argument, I shall leave the rule upon the footing, on which it is placed by the reasons assigned in this judgment.

THE MINERVA, ANDAULLE Master.

THIS was a case of an *American* ship taken by the French, on the voyage from *Languera*, a Spanish settlement, to *Corunna*, and afterwards retaken by a British cruiser, as the captors were carrying her to a French port. The ship and cargo were claimed for the same person.

On the part of the captors, the King's Advocate contended—That the cargo was subject to condemnation under the authority of the *Immanuel* (2 Adm. Rep. p. 186.) ; that in the cases of the *Mary, Star*, and the *Little Mary*, the Lords of Appeal had condemned the ship also, on a similar voyage, from the mother country of *Holland* to its colony.

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Colonial trade
from the colony
to the mother
country—
Diversion by
capture of a
French privateer
towards a
French port—
Such compul-
sory diversion
will not defeat
the illegality of
the original voy-
age: But whe-
ther to a Spanish
or French port,
cargo liable to
confiscation—
and the ship also,
by a subsequent
decision of the
Lords.

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But see since this
case, the *Ann,*
Lords, Lords,
3 Adm. Rep. p.
91, before the
Lords of Ap-
peal.

Anna Bauman,
Block, supra,
p. 167.

On the other side, Laturence—The principle of the *Immanuel* has not been recognized by any decision that has taken place in the superior Court; but taking it to be conclusive as a precedent in this Court, the circumstances of the present case do not justify the application. The voyage had been altered; and at the time of capture it could not be averred, that this cargo was going on a destination to the mother country, or in prosecution of any illegal intention. In other cases where a deviation had taken place, the Court allowed the claimant the benefit of that fact. With regard to the ship, there is no ground to contend for condemnation against her. In the *Immanuel*, and also in the *Rose, Young*, the ship was restored. The cases which have been cited from the Lords are of a very different description, being cases of *American* ships freighted in *Holland*, for the purpose of trading from *Holland* to her colonies, under an engagement to return back to *Holland*, and with the special pass of the government of *Holland*, which made them liable to be considered as adopted *Dutch* ships.

JUDGMENT.

Sir *W. Scott*—I am of opinion that this case is to be determined by the nature of the original voyage. If the destination was diverted only in consequence of a *vis major*, which the party was unable to resist, I cannot consider it as a defeasance of the original illegality, any more than if the diversion had been occasioned by the temporary fury of the elements. In both cases the original movement of the vessel must be considered; to which it must be presumed she would again immediately recur, as soon as an

opportunity presented itself. An allusion has been made to the case of the *Imina, Bauman*, in which the Court allowed to a party the full benefit of a deviation voluntarily made by the master, upon receiving information in the course of his voyage, that *Amsterdam* was in a state of blockade. There it was deemed not unreasonable to allow the act of the master in changing his course a favourable operation, respecting the cargo ; considering that it was taken in a voyage no longer in the act of being prosecuted towards the enemy's country, according to the intention of him to whom it had been confided : the Court presumed favourably that the owners would have approved of this deviation. But it would be going a great deal further to say, that the act of foreign necessity to which this vessel and cargo were given a temporary submission, no longer than whilst they were compelled so to do, was to be considered as a total discontinuance and abandonment of the intended voyage, on the part of the owners. The voyage of the ship and cargo, when left to their own discretion, would have continued the same, and must therefore be considered to be still existing *in law*, though controuled *in fact* by that overbearing necessity for the moment.

But even giving the owners the benefit of a deviation compelled by the superior force of a party, who stood in no relation of privity to them ; yet this deviation being to a *French* port, it would be a voyage from the colony of one enemy to the mother-country of an allied enemy ; which I have before held, is attended with undistinguishable consequences as to the cargo.

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With respect to the ship, I could have wished there had been some case decided on this point by the superior Court. The cases which have been mentioned were cases of more aggravated circumstances than the present. They were cases of false destinations, and attended with other circumstances of a closer and more incorporated adoption into the enemy's trade.

It is said, that the principle on which trade with the enemy's colony is prohibited, applies equally to the ship as to the cargo, and that the penalty ought reasonably to be the same; and it is impossible to deny it. There are, however, some other cases in which the penalty attaches in practice more strongly on the delinquent cargo than on the delinquent ship; though it is difficult to distinguish any degree in the delinquency. In cases of contraband, the offence of carrying the cargo is in its own nature as great as the offence of sending it: But yet a relaxation has in ordinary cases been introduced in favour of the ship, where the cargo is not the property of the same owner. Here the ship and cargo belong to the same person, and the offence being equally known, it would be impossible to find any distinction in principle, why the same penalty would not attach on both: But as this whole subject has been attended with some fluctuation of practice, I am disposed to take the matter in *mitiorem partem*; and particularly adverting to the authority of the *Rebecca*, (2 Adm. Rep. p. 101), and to some prior cases determined by my predecessor, I shall restore the ship, but subject to a forfeiture of freight and expenses.

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11th August, 1801. In a late case, the *Anna Dorothea*, taken on a voyage from *Cayenne* to *Bordeaux*; the same objection was taken against the ship. On the other side, the authority of the *Minerva* was relied on.

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MINERVA.

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Court—Till there has been some determination on this point by the superior Court, I shall not take upon myself to vary the practice which has prevailed, although by no means satisfied with its correctness.

Decree the same. Ship restored without freight.

In the *Jonge Thomas*, Lords, Nov. 1801, which was the case of a ship going from *Amsterdam* to *Surinam*.—The Court of Appeal considered the illegality to attach as strongly on the ship as on the cargo, and pronounced the ship subject to condemnation, on the ground of the illegality of the trade between the mother country and the colony of the enemy.

THE PORT MARY, COLLINS Master.

March —
1801.

In this case it was moved on the part of an *American* ship master, who had claimed some part of the cargo, but had not been able to specify the name of the person for whom he claimed: That he might be at liberty to inspect the papers, and that his claim might be received.

Motion to in-
spect papers
granted, sub
modo.

The Registrar said, The inconvenience attending such a practice, was that persons gave in on a claim, and then came to inspect papers, for the purpose of enabling themselves to frame other claims according to their contents.

Laurence—A carrier master cannot be expected to recollect the name of every individual.

The
PORT MARY.
March —
1801.

The Court directed the claim to be received *de bene esse*, and the party to be permitted to inspect such papers only, as might relate to that claim.

March 27th,
1801.

Freight not
earned by being
brought to a
port of the coun-
try of delivery:
Direction to
carry to the port
of destination.

THE WILEMINA ELEONORA, MOHR Master.

THIS was a case of a *Hamburg* ship, taken on a voyage from a *Spanish* port to *London*, and brought to *Plymouth*. The shipment appearing to have been made on account of *British* merchants under a licence, the ship and cargo were restored.

The present question arose as to a demand of freight, on the petition of the owner of cargo, that the ship might be directed to proceed on her final destination to *London*.—

On the part of the claimant of the cargo, it was said, that the ship had been brought out of her course, as it was amongst the terms of the charter-party, that she should call at *Plymouth* for orders.

On the part of the ship, it was objected, that if an insurance had been made in *London*, which should be vitiated by bringing the ship to *Plymouth*, it would be hard on her to be put in a worse situation, by being directed to proceed at her own risk.

Court—I am of opinion, that the ship cannot be pronounced to have performed her voyage, merely because she has arrived at a port of the country of her destination; it not being *her delivering port*. I

shall direct the ship to be restored with freight and expenses, when she arrives at the port of her delivery—It does not appear, whether there has been any insurance—if it should turn out, that an insurance has been made, and that it would be avoided by the capture, and the being brought to *Plymouth* (which I presume it would not), it may be proper to apply for farther directions.

The
WILHELMINA
ELEONORA.

March 27th,
1801.

THE HULDAH, MILLS Master.

April 21st,
1801.

THIS was one of several cases of ships and cargoes carried into *St. Domingo*, and proceeded against in a Court of Admiralty, which was held not to be vested with competent authority to proceed in prize causes. In consequence of that mistake, original proceedings were instituted afterwards in the High Court of Admiralty, on the petition of the claimants by a monition calling on the captors to proceed to adjudication.

Captors com-
pelled to pro-
ceed to adjudi-
cation notwith-
standing a lage
of near two
years.

The claim, in the present case, was not given till a year and nine months after the sentence of condemnation passed in the Court of *St. Domingo*.

The captors appeared under protest. *In support of the protest, the King's Advocate and Arnold*—It will be a case of great hardship on the captors, if they should be obliged to answer at this distance of time, when distribution has actually been made. The Court of *St. Domingo*, under which they have hitherto pro-

CASES DETERMINED IN THE

The
HULDAB.
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ceeded, was properly constituted as a civil Court of Admiralty; and His Majesty's instructions were addressed to it as a Prize Court: but by a mistake no warrant had been issued, to give it a prize jurisdiction against *France* and *Holland*; although there had been a prize warrant against *Spain*: Owing to this oversight alone it is that the acts which have been done therein are mere nullities; the captors knew nothing of this defect of jurisdiction; they proceeded regularly, and obtained condemnation: The claimant, who was himself present in the first instance, took no step to appeal from the former sentence, but lay by for such a period of time as would entirely have barred his appeal, had it been a regular Court in which the cause had been first heard. By his laches, it has happened that matters are now got into such a situation, that the claimant cannot be redressed but with great detriment and injury to the captor, in consequence of the distribution* which has taken place. The claimant is not entitled to be put in a better situation, than if the condemnation had passed in a Court of competent jurisdiction: In such a case, he could not, at this interval of time, have appealed; and therefore, the captors submit they are not liable to answer his demands, on the original claim now instituted in this Court.

On the other side, Laurence and Swabey—The captor's proceedings have been marked with irregularity in every stage: they first entered a protest, as was done generally in all these cases; but, after they had

* Sentence in the Court of St. Domingo, July, 1797; distribution, July, 1798.

waived that protest, by appearing and praying a monition for the transmission of papers. When the papers are brought in, the former protest is extended on facts fully within the knowledge of the parties in the first instance, unless it be the single circumstance of distribution.

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The Court has already determined that the prize proceedings of the Court of *St. Domingo* are to be taken as nullities; and that all claims for property carried in there are to be considered as if no proceedings had taken place. It is a fundamental principle of maritime jurisprudence, that the claimant was bound to go to the tribunal to which the captor had carried his property: He could not be supposed to know whether it was a competent jurisdiction or not—it lies on the captor to institute right proceedings in a proper place; and if he does not, from whatever cause it may arise, the claimant cannot be precluded from seeking redress, at any time when he may receive the necessary information, and finds an opportunity of so doing.—Till prize has been brought to adjudication, before a competent Court, the claimant is not barred by time, and cannot come too late to be heard. The captors, in this instance, have not obtained the sentence of a competent Court; without that, no laches of the claimant can give them a title, unless it could be said also, that a common pirate could obtain a title by such forbearance. It is impossible to sustain this protest as a bar to our claim, unless one of these three things could be maintained; either that the sentence of this Court could proceed to affirm the sentence of an *incompetent* Court—or unless it could condemn, *without any proceeding* (the

The
HELEN.

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reserved the distribution of all prizes taken by these vessels, to its own discretion. Besides these purposes of public policy which this arrangement answered, it had the additional advantage of providing a sort of general fund, out of which government might reward at its discretion, such of them as had cruised with merit, but without success.

So stands the matter with respect to prizes taken under their letter of marque; but it has been already observed, that no letter of marque is required to enable a vessel to make a recapture, or to entitle her to an interest of salvage. A recapture is not made at all under that authority, though they could not take a prize under any other. In the case of the *Robert*, the captors being one of these ship's, was considered on the footing of a private ship of war; and such appears to be their proper character, where they are not otherwise described by the act of parliament, and where the purpose of the act does not interfere. The only point on which it does interfere, is with respect to captures made under these cases. The provision of the act is, that the ship's goods, the proceeds of merchandize *so captured* shall be reserved to His Majesty, &c. The act does not necessarily extend to cases of recapture, and I am not disposed to carry the analogy farther than the words of the act direct. For all the purposes of this transaction, these ships are to be considered as if no such act had ever been made: If they would have been entitled to one sixth, supposing the act had never existed, I see nothing in it which should in any manner alter the proportion: It is true they are armed at the public expense, but for very different purposes, and no dif-

ference has been made in former wars on that account where these vessels were concerned. The interest which is reserved in the 10th section of the prize act, is such at results from the commission, and not such as is in no way derived from it.

Salvage decreed, one sixth.

After the sentence had been delivered , it was mentioned that there had been a decision of the Court, 10th May, 1798, in the case of the *Active, Smith*, retaken by the *Lively* revenue cutter, in which the Court decreed, that a revenue cutter should take an eighth salvage.

Court—I should feel great reluctance in deciding contrary to the declared opinion of my predecessor; but as this precedent was not mentioned till I had given my reasons for the opinion I have just expressed, as it is not particularly stated, and is not described to have been decided upon argument, I shall leave the rule upon the footing, on which it is placed by the reasons assigned in this judgment.

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THE MINERVA, ANDAULLE Master.

THIS was a case of an *American* ship taken by the *French*, on the voyage from *Languera*, a *Spanish* settlement, to *Corunna*, and afterwards retaken by a *British* cruiser, as the captors were carrying her to a *French* port. The ship and cargo were claimed for the same person.

On the part of the captors, the King's Advocate contended—That the cargo was subject to condemnation under the authority of the *Immanuel* (2 Adm. Rep. p. 186.) ; that in the cases of the *Mary, Star*, and the *Little Mary*, the Lords of Appeal had condemned the ship also, on a similar voyage, from the mother country of *Holland* to its colony.

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1801.
Colonial trade
from the colony
to the mother
country—
Diversion by
capture of a
French privateer
towards a
French port—
Such compul-
sory diversion
will not defeat
the illegality of
the original voy-
age : But whe-
ther to a Spanish
or French port,
cargo liable to
confiscation—
and the ship also,
by a subsequent
decision of the
Lords.

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HOLDAY.
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1801.

object of the protest being to bar us from any proceeding all)—or unless it could leave the property in the hands of these persons, as held by a just title, without any proceedings whatever.

JUDGMENT.

Sir *W. Scott*—This is a very hard case on the captors; but I do not think it is in my power to relieve them, from the necessity of proceeding to adjudication. During the existence of the prize commission, there is no fixed and definite time by which the party can be said to be legally barred from calling on the captor, to proceed to adjudication; although it may be proper to hold, that there *must* exist a time which would work such an effect; but I know of no prescribed limitation against the admission of a claim, nor of any other means, by which the captor can protect himself, but by applying to a court of competent jurisdiction. If he neglects to apply to any tribunal, he would be guilty of a great misdemeanor; if, through misapprehension, he applies to an improper tribunal, though he may defend himself against the charge of a misdemeanor, he cannot protect himself from the call of the claimant, to proceed to adjudication before a competent tribunal. In this case, there is no imputation of misconduct; the captor went to a Court which was sitting at *St. Domingo*, apparently with competent authority; in that Court he obtained a sentence of condemnation, and distribution has taken place in consequence of it: But that Court having no authority, those proceedings are null and of no legal effect whatever. On the other hand, it was the duty of the claimant to have brought this

matter before the Court as soon as he could ; as it is always in the power of the claimant to compel the captor to proceed, if he neglects to do so himself. It might, perhaps, appear to the claimant, who is not bound to look to the nature of the jurisdiction, by an obligation equal to that of the captor, that the Court was not incompetent : It might be a common error. In that case, it would be something to shew that he had entered an appeal : the appeal, it is true, could not have been received, as it came from a Court which had no legal existence ; but it would have proved the parties to have used diligence, which might be material, if questions of costs and damages should arise. There existed something of difficulty, a sort of cloud of uncertainty on the minds of persons as to the competency of the Court, which might account for some part of this delay. However, the claimant has now applied to this Court, and I am of opinion, that the Court is under the legal duty of admitting the claim, and that it cannot relieve the captor from the obligation of proceeding to adjudication.

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HULDAH.

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Protest over-ruled.

An absolute appearance being given for the captors :—The cause was heard on the merits, when the Court decreed restitution of the principal part of the cargo belonging to the owner of the ship.

(Instance Court.)

*Dec. 18th,
1801.*

THE GRATITUDINE, MAZZOLA Master.

Power of a master over his cargo, in cases of distress—
a master may hypothecate his cargo on freight for repairs in a foreign port, such repairs being necessary for the prosecution of his voyage.

THIS was a case of considerable importance to the interests of commerce, respecting the power of a master of a vessel to hypothecate his cargo on freight, in a foreign port, for the repairing of damages sustained by the ship at sea; such repairs being absolutely necessary to enable the ship to proceed on her voyage, for the purpose of delivering the cargo, according to the charter-party.

A statement of all the particular facts, together with the principal documents, will be found in the appendix, as abstracted from a very minute account of the proceedings in the Court of *Lisbon*, from the petition of the master made to that Court, up to the sentence recording the petition, survey and estimate, &c.

For the Petition, Arnold and Robinson—Putting out of the present discussion the justness of the account which has been the foundation of the bond, and the reality as well as magnitude of the difficulties which gave occasion for it, as matters either not disputed, or if disputed, as fit to be settled, as the Court has intimated, by a reference to the Registrar and merchants, we are called upon to shew by what authority of law the master of a carrier vessel can pledge the cargo, being the property of a general

freighter, for the repairs of the ship. In cases not dependant on the necessities of navigation, it would be idle to contend for such a power: But in cases of great necessity, adverting to the peculiar situation in which a master is placed in times of danger, and to his known power over the cargo in other analogous cases—such as *Jactus* and *Ransom*; adverting to the principles of the maritime law, which impose on the master a particular trust, and require of him a responsibility, in cases of emergency, for the benefit of the owner of the cargo; it seems to follow as an essential provision of the same system, that he should have a power and authority over the cargo, adequate to the purpose of discharging his duty, and providing for a safe delivery of his cargo at the port of destination. Freight is not earned but on delivery: It is But reasonable on that ground, that when extraordinary exertion is necessary to effect that purpose, on which his whole interest is made to depend, he should have so much authority, as may be necessary to counteract the force of temporary accidents: Again masters are forbidden,* even in distress, to delay their voyage

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* Laws of Oleron, art. 23. "Une marchant frett une nef et la charge, et la mett en chemin; et entre cette nef en une port, et demeure tant que [denari] luy faillett, maître puet bien envoyer en son pays, pour querir de l'argent; mais il ne doit perdre temps, car s'il le faisoit, il est tenu a prendre aux marchands tous les dommaiges qu'ils auront: mais le maître puet bien prendre des vins aux marchands, et les vendre pour avoir son estrement. Et quant la nef sera arrivée a droitte descharge, les vins, que le maître aura pris, doivent etre au feur mys, que les autres seront vendus, ne a greigneur feur ne a moindre: Et aura le maître son frett diceulx vins comme il prendra des autres. Et c'est le jugement en cest cas."

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for want of money in a foreign port. They are indeed directed to write to the proprietors of the cargo, and supply themselves in that way, if it can be done without delay; but at the peril of answering for damages incurred by delay. This responsibility is enjoined upon them by the laws of *Oleron*, which are in a peculiar manner incorporated into the maritime jurisprudence of this country, being copied into the Black Book of the Admiralty, as part of its substance, and being continually referred to in the public instruments of later times* (*H. 6.*) as an important part of the maritime law of this country.

Such a responsibility must, at least, be provided with the means of conforming to it: Accordingly by the express letter of the codes of all the states of Europe, the cargo is held up as a fund to which in cases of necessity the master is allowed to resort. The master may bind it for a ransom bill (*Consolato*, art. 287), or if he becomes a pledge for the payment, the cargo is liable for his redemption: He may throw it overboard to preserve the ship in time of danger: He may sell a part in port to provide for the necessities of the ship, and enable him to continue his voyage. The *Consolato del Mare*†, art. 104, directs, that if

* *Contra leges maritimas et statutum d'Oleron.—Juxta formam et statutum d'Oleron.* Black Book of the Admiralty.

† 104. Proceeding on a supposition that the merchants were on board, and having money: "Ancora e tenuto il patrono della nave, che se il mercante havera denari, et che fussero in loco, che il patrono della nave havesse bisogno di escarcie o alcuna cosa che necessaria fuse alla nave, il mercante gli debba prestare in quel-

the merchant is present, having money, he shall lend it; if he has not money, the master may sell part of the cargo, giving him a lien on the ship for his security. The same power is given in the art. of the laws of *Oleron* before cited, and it is copied into the code of almost every state in *Europe*. It is true, the words of these ordinances describe a power to sell a part; but that is not to be taken as a less power than the power of hypothecation, but rather as a greater power including the other, and expressed in that form only, because in the early stages of foreign commerce, it would appear best adapted to obtain credit, inasmuch as a bond to be enforced in a distant country would not be so negotiable and so acceptable to a foreign merchant, as the absolute sale and delivery of part of the cargo. Nor is this mere inference unsupported by fact. The ordinance of *Antwerp*, art. 19, does

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modo, che il nochiero, et gli altri mercanti conosceranno che si debbia fare, e per tale ragione tutti li compagni, et prestatori che nulla nave saranno, si debbano tutti obligare al detto mercante; et se il patrono della nave, o gli compagni, o li prestatori trovasino alcun huomo, che gli prestasse, il sopradetto mercante non è tenuto de niente al loro prestare."

105. Supposing that the merchants on board had no money: " Se il patrono della nave ha bisogno di denari, e non ne trova, come di sopra è detto, et che fussino in loco sterile, et che quelli denari havesse di bisogno per spacciamento della nave, et se gli detti mercanti non hanno denari, loro debbano vender della lor mercantia per spacciare la nave, et nessuno prestatore, ne compagno non possono dir niente, ne contrastare, insino che que mercanti sieno pagati, salvo che g.i salari di marinati. Imperò è da intendere, che il mercante veda et conosca che quello che lui presterà, sia per spacciamento della nave et necessario della nave."

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incidentally mention the power of pledging in the same article. "Le maître du navire ne pourra vendre ni engager aucun marchandise *tant qu'il trouvera* argent au change ou grosse avanture—Pourra à toute extrémité vendre des marchandises chargées." The object of this article seems to have been to lay restraint on the master in ordinary cases; yet the power of engaging the cargo is forbidden only *conditionally*, and *sub modo*; and from the manner in which it is mentioned, it appears to have been considered as a more eligible mode of raising the necessary sums than an actual sale. In the same manner, the laws of *Sweden*, having forbidden the master to sell more of the cargo than should amount to a fourth part of the value of his ship, prescribe a punishment if he exceeds, "si petulanti modo vendat vel oppignat navem et bona in universum, ille non modo tenebitur resarcire exercitoribus et conductoribus omnia damna, sed etiam pra delicto suo plectetur." *Jus marit. Suec.* tit. 4. c. 2. sect. 1, 2. In the same manner, later writers speak of the power of hypothecating the cargo in cases of need, as the known law. *Molloy*, v. 1. p. 334. *Bynkershoek* in a treatise on bottomry, describes it "Contractus quo tota navis et partes, et si hoc actum est, etiam onus pro pecunia erogata pignori ponitur: Hæc omnia obligavit magister et obligare potuit." *Q. Jur. Priv.* l. 3. c. 16. In the common law books of this country, it appears to have been the settled understanding of the Court of King's Bench in the beginning of the last century, *Justin v. Ballam*, 1 *Salk.* p. 34. and it is adverted to by modern writers of high authority, as continuing to be the law at this day, *Park*, p. 413. In addition to these authorities, it is

found to have been the constant practice of this Court to proceed upon such bonds ; and numerous instances are produced in a list, that has been looked up since this question was first agitated, in which money has been paid out of the court on bonds enforced against the cargo. On these grounds, the bond-holder, having lent his money under a security sanctioned by all ancient principle, recognized by constant usage and practice, and not vitiated by any misconduct appearing in the transaction, is entitled to the authority of this Court to enforce the payment of his debt.

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For the Proprietors of the cargo, the King's Advocate, Laurence, Swabey, Adams—On a question of great importance to the mercantile world, in which, the possible mischief, arising from an abuse of the power contended for, might be immense, it was to be expected that some very cogent and direct authority would have been produced in support of such a demand. Excepting the list that has been extracted from the registry, of which it does not appear that any one case was a contested case, it may be safely affirmed that nothing in the nature of a judicial precedent has been produced : It may be taken therefore as an admitted fact, that no such authority exists. To supply this deficiency, reference has been made to authorities of another nature, drawn indirectly from principles which govern analogous cases, as they are called, and from the loose dicta of ancient foreign ordinances and writers on these subjects. Such authorities at best are but very unsatisfactory in cases of great importance : They will appear still farther weakened by the observations that may be made upon them. The

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cases of *Ransom* and *Jactus* depend on other principles, arising out of urgent and instant danger, in which the titles of property are sacrificed, with every other consideration, to the preservation of human life. As to cases of authority exercised over the cargo deliberately and in safety, in a foreign port, the utmost that is directly sanctioned is a power to sell a part;—but this arises from principles very different from those which have suggested this action, and leading to consequences very different from what the proprietors of this cargo will suffer, if the demand can be maintained. The master is the appointed agent of the owner of the ship, and as such competent to bind him in many instances. He is bound to consult the benefit of the owner of the ship, as to the best means of accomplishing his voyage. The ordinance of the *Hans Towns*, tit. 6. art. 2. *Emer.* v. 2. p. 432. contains a minute description of his duty in such situations, and, as we submit, prescribes the proper limitation of his power: If he is in want of repairs, “ *Et istic loci nullum cambium ad exercitores transmittendum obtinere queat, aut etiam in navi nulla bona habeat, quæ meliori cum commodo exercitorum, quam pecunia sub fænore nautico excepta vendere possit;* tum hoc in casu necessitatis, pro servandâ navi et bonis, habeat potestatem, nomine universorum exercitorum, tantum pecuniæ sub fænore nautico accipiendi, quantum ad reparationem damni et alios similes casu necessitatis opus habet; et taliter quicquid fænori accepit, universi exercitores solvere tenebuntur.” The whole of his discretion is supposed to be exercised *pro meliori commodo exercitorum*—but he is not entitled to lay any burden on

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the owners of the cargo. If his ship is disabled by accident and storms from proceeding, he is not bound on their account either to tranship or to repair. It is said that he may repair or that he may tranship; but the law lays no obligation upon him to do either.—If he judges it for the advantage of his owner, various modes of raising money are offered to him, and he may so far meddle with the cargo as to sell a part; but not as agent for the proprietor, or as engaging him in the repair of the ship—but as making a forced loan, as it is termed, for the benefit of his employer; and for which the proprietor of the cargo is to be ultimately indemnified—at the price at which the remaining articles sell at the port of their delivery. In no case was it designed, that the proprietors of the cargo should suffer, for the repairs of a ship to which they are strangers, and under the direction of a man, for whom they are in no degree responsible. The sale of a part would be easily compensated to them, by the value of the ship and freight; and according to some ordinances, the master was himself personally liable to them, (*Em. v. 2. p. 445.*) Of a very different nature and extent is this power of hypothesizing the whole cargo, by which the burden of repairing the damages of the ship may be; in the event, thrown upon the cargo; and by which all distinctions of general and particular average, may be overturned, and the whole expense be thrown as a particular average, upon a person no way interested in the vessel. Neither the *Consolato* nor any later codes, mention such a power. If there are instances in which writers appear to attribute such a power to the master, they will be found to be instances relating to cases, where the master is also the consignee of his

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owner, and the *dominus mercium*, as well as the master of the ship.—There is a passage in *Targa* which points strongly to such a combination of interests, as necessary to support such an act of authority exercised by the master over the cargo :—“Quando il capitano, e essercitori inbarcano robbe e merci de proprio conto, puono prender danari à cambio maritimo supra corpo e merci *giontamente*, perchè hanò la disposizione dell’ una et l’altra materia ; echi le dà, hâ hy potheca piu amplia, c. 32. n. 1. *Erm.* p. 477.” When the interests were several, as the necessary interpretation of this passage seems to imply, no such power could exist to bind the property of another person. *Bynkershoek* also in the passage cited, seems to refer to a situation where the ship and cargo belonged to the same person ; at least it is far from appearing that he meant to assert, that the master, *qua* master, was empowered to hypothecate the cargo of a general freighter for the repairs of his ship.

Having been speaking of the origin of bottomry, and the simple form in which it continued till the middle of the 17th century, as a power given to the master in distress to hypothecate the vessel :—“Ita tamen ut duntaxat de navi dominus teneatur, non ultra,” *Bynkershoek* goes on, “ad solos magistros, et scolas, ut dixi, naves obligatas pertinebat hæc causa mutui sed deinceps protracta est ad exercitores sive dominos, et mox etiam ad dominos *mercium*.”—So far the powers are described *severally*, according to the several interests. It is not said, that, by the latest extension, the master was considered as competent to bind the goods, as *dominus mercium*.—In a following passage, discussing the personal responsibility

of the master, he decides against it—“ *Nisi magister sit inter ipsos exercitores, vel onus pro parte ad ipsum pertineat.* In this instance, there was clearly a combination of interests, which, it is not improbable, continued to be in the contemplation of the writer, during the next page, from whence the passage cited on the other side, is taken ; if in fact the words *haec omnia, obligare potuit*, are to include the *onus* mentioned in the preceding sentence. He had been just before referring to some case decided in the council of *Holland*, in which the fact might be, that the master was part owner of the cargo—or perhaps, as it is more probable, the cargo might not be amongst the things hypotheccated ; for he begins the whole paragraph,— “ *Dixi, et naves, et instrumenta navium pignori dari,*” adverting only to the ship ; and he concludes immediately after the sentence relied on, “ *Haec omnia instrumenta, salva creditoribus, non magistro vel exercitoribus ;*” as if his consideration was directed solely to the case of hypothecation of ship and furniture. The other authorities that have been cited, will be found in the same manner irrelevant. *Molloj* relies entirely on the article of *Oleron*, and far exceeds his authority in the *dictum* which he advances on the subject. In the same manner, the citation from *Salkeld* is a mere *dictum* of the reporter, not suggested by any of the circumstances of the case, nor depending, as far as it appears, on any thing that fell from the Court ; the same case being reported by *Lord Raymond* without any such observation. The passage from *Mr. Parke* rests solely upon *Salkeld*. The list that has been extracted from the registry, contains no instance of an adjudged case, and therefore cannot be conclusive.

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Upon this view of the argument, it is not too much to say, that nothing has been produced that can have the force of direct authority to support this demand. It is in its consequence of momentous importance to the interests of commerce, and may be pregnant with incalculable mischief, if a power so easy to be abused should fall into the hands of fraudulent or improvident persons.

In reply, Arnold and Robinson—As far as the policy and probable effect of the law is to be considered, it would not be difficult to shew, that the power in dispute could operate only beneficially for the interest of the proprietors of the cargo: The master's power, as an absolute power, convertible to purposes of fraud, would in no degree be increased by it: The cargo, in all cases where no supercargo is on board, must be in his possession, and subject, as a possible accident, to misapplication and abuse: The inducement which the allowance of the authority in question would afford, would lead him to come back with his accounts, and submit them to the eye of his employer, and the strict investigation of a Court of Justice; a temptation as little likely to suggest measures of fraud as any that can be conceived.—But, was the opportunity of abuse greater, would that impeach the soundness or necessary utility of a general principle? or, can it be supposed that this danger is predominant over every other consideration of maritime jurisprudence; when, as far as the not inconsiderable value of a ship extends, that is allowed to be subjected to this danger, by every code that exists. The great object of the law of bottomry is

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to secure the arrival of the ship and cargo at the port of destination : To this end, a power to sell the ship in a foreign port could not have conduced, and was accordingly never entrusted to the master : His power over the ship is specifically limited to the power of hypothecation : His power over the cargo is described in general terms to be a power to *sell a part*, but not as excluding the power of hypothecation, in the same manner as the power of *selling* the ship is excluded ; for the same reason does not apply : The final success of the voyage never could be frustrated by such an alternative, as to the cargo. In the ancient state of commerce, when intercourse with foreign nations was more limited, hypothecation would not be so good a security to the foreign merchant as the sale and delivery of a part, and, therefore, in the simple language of ancient codes, the most obvious remedy was alone described, not as *excluding*, but rather *including*, the alternative of hypothecation, as a milder remedy, where it could be effectual.— Where it can be applied, it is undoubtedly a milder remedy, inasmuch as it insures, or tends to insure the arrival of the whole adventure at its proper port; and thereby provides, that if the sale of a part is ultimately necessary, it shall be conducted to the best advantage, in the market for which it was assorted, and in the hands of the proprietors or consignees : Such a modification is not only to be inferred from the spirit of the ancient codes, and the nature of the subject, but is incidentally expressed in some of them, in terms that are too clear to be misunderstood. The regulations of *Antwerp*, use the words *ni vendre ni engager*; and the laws of *Sweden*, making no use

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of the expression *oppignare*, as to the amount to which the master's power to sell was allowed, but passing by that probable contingency, without any observation, or without providing any punishment for it, as for an abuse or extension of his power, expressly declare, as to a larger amount, "*Si petulanti modo, &c. vendat vel oppignat;*" he shall be responsible to the *owner* and *freighter*, *exercitoribus et conductoribus*, &c.

The express prohibition of *hypothecating* as well as selling ship or goods, beyond the fourth part of the value of the ship, connected with the omission of any mention of *hypothecating*, *within* the limits prescribed *far selling*, justifies us in supposing that as far as the master was allowed to *sell*, he was *not* prohibited from *hypothecating*. It appears also that he was equally free to act in this manner with respect to the goods, whether they belonged to the owners of the ship or not; for his responsibility being put severally, when he was responsible, *exercitoribus vel conductoribus*; when he was not responsible (*that is*, either for hypothecating or selling within the prescribed limits), it would be to the same several interests, to his *owner or freighter*, that no responsibility was due. It cannot, therefore, be maintained, that in all cases universally, where a power over the cargo was attributed to the master, it was in contemplation of an union of interest in his employer. Indeed the whole of that hypothesis seems to be unfounded. It is built upon a passage in *Targa*; but that passage does not relate to bottomry, properly considered, as the resource for cases of distress in a foreign port: It applies to the contract *à la grosse*, at the commence-

ment of the voyage in the port of the proprietors, and is rather to be taken as a contract on *respondentia*.

The passage it so cited by *Emerigon* in his chapter *contrat a grosse*, having been passed over without notice in the preceding chapter, where the writer is treating expressly of the power of the master, to sell part of his cargo in a foreign port. The same observation applies to the argument from *Bynkershoek*: He is evidently speaking in some parts of the chapter on bottomry, of bonds given in the port of departure; which, as to the cargo, must be bonds on *respondentia*; on this account, he may have delivered himself with less perspicuity than is generally natural to him. But, in the passage cited, the cargo is expressly included, as being under the power of the master, and the obvious sense of his terms imports it to have been his opinion, that the master, *as master* only, was, on particular emergencies, competent to bind the cargo: On any other supposition, if he had been the owner of the cargo, or the constituted agent of the ship and cargo, there would have been no reason for any order or limitation in the manner of doing it; he might have elected his remedy, either on ship or cargo: Instead of that, it is now put subject to the prior hypothecation of the ship, "*si hoc actum est, etiam onus pro pecunia erogata pignori ponitur.*"

Another argument has been built on a supposition that the master was bound only to act for the benefit of the ship—that he was not called upon to act for the cargo—that the law did not authorize him to bind the proprietor of the cargo; and that his power, to sell a part, was understood only as a power to make

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a temporary loan, for which the proprietor must in all instances be indemnified. It has been before observed, that the master is in some cases made responsible to the owner of the cargo for the delay of his voyage arising from distress ; It will be a sufficient answer to the latter part of this argument to say, that the fact of a supposed indemnification in all cases cannot be maintained. It appears that a difference of opinion has existed in writers and in codes on this point. The laws of *Wibuy* had provided for such an indemnification, and directed " Le navire venant à se perdre, le maître sera néanmoins tenu de payer au marchand les susdites marchandises ; " *Valin* and *Potier* seem to have concurred in this opinion ; but *Emerigon* opposes them, on the ground that in the older and more general codes it never had been so established, and he cites against them the article of the *Consolato* 105, and says, " Il ne réserve aux propriétaires des marchandises vendues, qu'un simple privilége et préférence, sur le navire ; " he cites also the 23d article of *Oleron* and the 19th, règlement d'Anvers to the same effect—and he concludes a following chapter, by giving his opinion on a case so similar to the present, that, excepting the difference of sale and hypothecation, it is directly in point. From that opinion we learn, that it by no means appeared monstrous or unreasonable to one of the best writers on maritime law, that, in some extreme cases, the repairs of a ship, for the prosecution of the voyage, might be greater than the proceeds of the ship and freight, and that on such an occasion a loss might eventually fall upon the cargo, very consistently with sound principle and the

general interests of commerce.—“ Si au lieu de prendre des derniers à la grosse, le capitaine avoit vendu pour cause légitime (which could only be distress in a foreign port), une partie des marchandises du bord, et que, au retour du voyage, le navire et le fret (aggravés par des engagemens postérieurs et par les salaires de l'équipage) fussent insuffisans pour rembourser le prix des dits marchandises, cette partie devroit être supportée au sol la livre par les autres marchandises;” and farther, “ celui dont les effets sont vendus, pendant le voyage pour les nécessités de la navigation, n'a pu ni s'y opposer ni se procurer aucune resource particulière contre la personne du capitaine. Il est donc juste qu'en cas d'insuffisance du navire et du fret, abandonnées par les propriétaires, la perte soit réglée sur l'universalité des chargeurs, dont la condition doit être égale.” Vol. 2. p. 464.

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Sir *W. Scott*—This case has been learnedly argued; and I have thought it due, not only to the arguments, but also to the extreme importance of the question, as affecting the commerce of this country, to take some time for deliberation in forming my judgment upon it. The case comes on, upon petition, which states, “ That the Imperial ship the *Gratitudine*, having on board a cargo of fruit, and bound from *Trieste*, *Zante*, and *Cephalonia*, to *London*, met with extremely tempestuous weather, and sprung a leak, whereby the cargo sustained considerable damage; that the master was obliged, for the safety of the ship and cargo, and for the preservation of the lives of the crew, to put into *Lisbon*, and unlade;

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that the master applied for advice and assistance to *F—Calvert*, who was the correspondent of Mr. —*Powell*, one of the principal consignees, in *England*; that Mr. *Calvert* wrote a letter to Mr. *Powell*, advising him of the misfortune which had befallen the cargo, and the steps which had been taken, and desiring his directions for their farther conduct; that in answer to that application he received a letter from Mr. *Powell*, stating, ‘That to the master it belonged exclusively to adopt every necessary measure for the preservation of the cargo, and that if it was necessary to unlade, the master alone was to judge of the propriety of such a measure.’ That the master being in want of money to defray the charges of repairing the vessel and of unlading the cargo, borrowed of the aforesaid *F. Calvert* the sum of £5,273 12s. on a certain bottomry bond, bearing date 31st *January*, 1801, binding the ship and appurtenances, cargo, and freight, to pay the said sum of £5,273 12s. within twenty-four hours after the arrival of the said ship in the port of *London*, or any other port; that the said bond had been duly presented to the master who refused to discharge it; that the holder had no other means of recovering his debt than by proceeding against the ship, freight, and cargo, and prayed the Court to decree a monition, against the bail given to answer the action in respect to the cargo and freight, for payment of the balance due, after payment of the proceeds of the sale of the ship.”

On the other side, it is alleged—“ That the master had not *under the circumstances stated*, a right to hypothecate the cargo for the repairs of the ship; for

payment whereof the ship, her master, owners and freight are liable; that the cargo is by law only subject to pay an average proportion of the charges, to which the cargo laden in the said ship was liable to, for the unlading and reshipping the cargo and other expenses relating thereto; all which, with the freight the parties had always been and were willing to pay."

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The proposition contained in the act does not go the length of asserting universally, that the master has not a right to hypothecate his cargo in any possible case, but denies the power of the master to hypothecate it *under the circumstances* of this particular case: In the course of the discussion, however, the argument has been carried to the entire extent, and it has been contended, that the master has no right to bind the owners of the cargo, in any case—upon this ground, that although he is the agent and representative of the ship, and by virtue of that relation may bind the ship and its owners, he is not the agent of the proprietors of the cargo, and therefore cannot bind it. It is said, that he is the mere depository, and common carrier, as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. This position, that *in no case* has he a right to bind the owners of the cargo is, I think, not tenable, to the extent in which it has been thrown out; for, though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is

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forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted, that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports, into which he may be compelled to enter.

The case of throwing overboard parts of the cargo at sea is of that kind: Nothing can be better settled than that the master has a right to exercise this power, in case of imminent danger: He may select what articles he pleases; he may determine what quantity; no proportion is limited; a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the *whole* cargo over board—The only obligation will be, that the ship should contribute its average proportion. It is said, this power of throwing over the whole cannot be, but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is—So likewise with respect to any proportion, he can be justified only by that necessity; nothing short of that will do;—the mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part; It must be a necessity of the same species, though perhaps differing in the degree.

Another case is that of ransom; in which, it is well known, that by the general maritime law a master

could bind by his contract the whole cargo, as well as the ship; he could not go beyond the value of the goods, but up to the last farthing of their entire value, there is not a doubt but he might bind the cargo as well as the vessel; a very modern regulation of our own private law, founded on certain purposes of policy, has put an end to *our* practice of ransoming; but I am speaking of the general maritime law and practice, nor superceded by private and positive regulation.

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These are instances of authority at sea: There are other cases also in port, in which the master has the same authority forced upon him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies, the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law, that the cargo should be left to perish without care—What must be done? He *must* in such case exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted in argument that he is not absolutely bound to tranship; he may not have the means of transhipment; but even if he has, he may act for the best, in deciding to sell; if he acts unwisely in that decision, still the foreign purchaser will be safe under his acts: If *he had not* the means of transhipping, he is under an obligation to sell, unless it can be said, that he is under an obligation to let it perish.

With respect to practice, I understand from a

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gentleman very conversant with the commerce of the *West Indies*, that it is by no means unfrequent for an application to be made to the Vice-Admiralty Courts in that part of the world, for leave to empower the master to sell: I understand it likewise to be matter of complaint, that this power is sometimes abused by an improvident and collusive sale of cargoes, when no real necessity exists; that is, in other words, that the power is usurped in cases where the party does not legally possess it. But the very ground of the defect of power in such cases, implies and affirms its existence, in cases where the necessity is real.

In all these cases, the character of agent respecting the cargo is thrown upon the master, by the policy of the law, acting on the necessity of the circumstances in which he is placed. But it is said, that this can only be *done for the immediate benefit of the cargo*, and not *for the repairs of the ship*.—It is very true, that this involuntary agent ought, like an appointed agent, in all cases, to act for the best, respecting the property. Even in the case of an universal *jactus*, which appears least likely to conduce to the benefit of the cargo, still *it is so*; the ship is compelled in that case to pay an average, by which means the little which is to be taken as a remnant of the cargo, is preserved; whereas otherwise both ship and cargo would have been totally lost; In the case of ransom, what was intended for the benefit of the cargo *may* eventually consume the whole, the proprietor will not be benefited in such a case, but he cannot be damnified; he will have had the chance of advantage without the danger or possibility of loss; for he cannot suffer beyond the value of the cargo,

which, without such ransom, would have gone to the enemy in *toto*. It is the same consideration which founds the rule of law, that applies to the hypothecation of a ship. In all cases, it is the prospect of benefit to the proprietor, that is the foundation of the authority of the master. It is therefore true, that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs; but it appears to me that the fallacy of the argument, that the master cannot bind the cargo *for the repairs of the ship*, lies in supposing, that whatever is done for the repairs of the ship, is in no degree and under no circumstances done for the benefit, or with a prospect of a benefit to the cargo; whereas, the fact is, that though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo.

Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described, being a stranger in a foreign port, in a state of distress, without an opportunity of communication with the owners, or their agent? What is his duty under such circumstances? It may be answered generally, *to look out for the means of accomplishing his contract, if possible; that is, the safe conveyance of the property entrusted to his care, in that same vehicle which he had contracted to furnish.*—It is admitted that though empowered to tranship, he is not bound to tranship. No such obligation exists according to any known rule

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of the maritime law ; and if it did, still he must be affected with the opportunity of transhipment, and with wilful neglect of such opportunity, for wilful neglect shall not be presumed. He may even be restrained from transhipment if he has the means, by knowing that insurances were made on the original shipment which might be avoided by such a change. Having the general duty of carrying the cargo to the place of destination imposed upon him, not being obliged to tranship, and it not being shewn that he has the opportunity of transhipment, he must be presumed to look out for the means of repairing his ship for the accomplishment of his contract. The first and most obvious fund for raising the money, is the hypothecation of the ship ; but the foreign lender has a right to elect his security, for he is not bound to lend at all ; he may refuse to lend upon the security of the ship, or on that security alone ; it is no injustice on his part ; and if he does so refuse, the state of necessity still continues.

The security of the ship not being sufficient, and the master not being able to raise money on that alone, what is he to do ? It cannot be said, that he is in all cases to wait till he hears from a distant country. The repairs may be immediately necessary ; it may be hoped that the repairs will be far advanced before he can hear from the consignees ; the master may not know the proprietors at all, but only the consignees ; they may be mere consignees, and have no power to direct him, but in the single case of an actual delivery to them ; if owners they may be very numerous ; for in a carrier ship there may be a hundred owners of the cargo, and the master may be in danger

of receiving an hundred different opinions, supposing it were possible for him to apply to all. What does the necessity of such a case offer to be done? I conceive one of two things,—*to sell a part of the cargo*, for the purpose of applying the proceeds to the prosecution of the voyage by the repair of the ship; or *to hypothecate the whole*, for the same purpose: With respect to the former, the Books overflow with authorities, many of which have been stated: They all admit that he may sell a part; some ancient regulations have attempted to define what part; others have not. The general law does not fix any aliquot part: and indeed, it is not consistent with good sense to impose a restraint, or to fix any limitation to measure a state of things which is to arise only from necessity. It must, generally speaking, be adequate to the occasion. One limitation, however, the policy of the law necessarily prescribes, that the power of selling cannot extend to *the whole*: because it never can be for the benefit of the cargo, that *the whole* should be sold, to repair a ship which is to proceed *empty* to the place of her destination. There will, in that case, be no safe custody and transmission; and, therefore, the power of selling, for the repairs of the ship, must be limited to the sale of *a part*, though it may not be possible to assign the exact part, except where positive regulations have fixed it.

But hypothecation may be *of the whole*, because it may be for the benefit of the whole, that the whole should be conveyed to its proper market; the presumption being, that this *hypothecation of the whole*, if it affects the cargo at all, will finally operate *to the sale of a part*—and this in the best market, at the

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place of its destination, and in the hands of its proper consignees. In the unfortunate case before us, in which there has been such a combination of calamitous circumstances, as can hardly be expected to happen again, the loss of a part of the whole, sold in the hands of its proper consignees, is all the effect that will be produced ; and it can hardly ever happen that the hypothecation will reach the total value of the cargo. On the other hand, the safe conveyance of a valuable cargo may be, in many instances, of infinitely more value to the merchant, than the whole expense of the repairs, if the whole *could* be devolved on the cargo : Generally it cannot be so ; in the very form and structure of the bonds, the ship and freight being usually the first things that are hypothecated ; but if it were to happen that they were omitted in the literal terms of the bonds, still they would be liable in contribution to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind. On principle, therefore, the right of hypothecation of the whole cargo is extremely natural, and if I am right in considering it as equivalent to a sale of a part, it is little more than what all the books of maritime jurisprudence direct to be done ; it is in truth but a power to make a partial sale, conducted with greater probability of ultimate advantage to the whole ; for, as all must finally contribute in the case of an actual sale of a part, what new hardship is imposed ? All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the par-

ties, than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance.

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Cross accidents may intervene in the sequel, to make the contract of hypothecation less beneficial than might have been expected at the time. In the present case, the ship was estimated by public authority, at *Lisbon*, at £2,300, the freight amounted to as much; the sum to which it is admitted the cargo is liable for its own proper charges, would have made up almost the whole of what remained, so that a very small part of the cargo would have been affected. It has happened by subsequent accidents, as it was observed in argument, cannot invalidate the original contract. The worst that can happen, and this only by a most perverse combination of circumstances, is, that the whole value of the cargo might be answerable; still I should say, speaking with all the caution that is due on such important interests, better is it that this should happen (if it can happen), in a few very eccentric and almost unnatural instances, than that the master should have no discretionary power to act for the preservation of the cargo; but that he should be compelled in all cases, and under all circumstances, to proceed to the sale of possibly a considerable part of his cargo, at a most improper port, for which his cargo is not adapted, as a distressed man, and as a man whose distresses are known to every person who has to deal with him in the purchase of those parts of his cargo.

An extreme case has been put by the King's Advocate, of a large and valuable ship, with a cargo of

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inconsiderable value, belonging to *Dover*, and falling into this distress in a neighbouring port; as at *Calais*; and it is asked if it would be reasonable to consume a small cargo in the service of a ship so situated? It may be sufficient to answer, that it is not the case before the Court; and that it differs from this case in the exact proportion of the difference of the distance between *London* and *Lisbon*, and of that between *Dover* and *Calais*. Supposing such a case, it would be expected, undoubtedly, that the master should use his utmost endeavours to correspond with the consignees or proprietors; but a case of instant necessity might occur even so near; the master might not be able to receive their directions; all communication might be interrupted, as it is sometimes for a fortnight or three weeks, or more, in adverse or tempestuous weather, and then the same principle would apply: But, whatever might be the objection to such a case, just the same objection would lie against the known and admitted power of the master to hypothecate the ship, supposing the owner of that ship to live at *Dover*. If necessity was urgent, even that extreme case would come under the operation of the same principle.

So much upon mere principle.—How does the matter stand with regard to authorities? In the first place, it is not improper to observe, that the law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules; and whatever is *reasonable* and *just* in such cases, is likewise *legal*; it is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects.—

In the next place, if I am right in considering *hypothecation of the whole*, as equivalent to *the sale of a part*, then all authorities for a partial sale are authorities also for a total hypothecation. Thirdly, I must observe, that it is not to be expected, that the ancient codes should contain much precise regulation, or direct authority on this subject; this contract of bottomree, being comparatively of later growth, and arising out of the necessities of an enlarged commerce. *Bynkershoek* expresses himself, I apprehend, with great historical accuracy on this subject, when he says, "Origo hujus contractus ex jure Romano, sed quæ ibi legimus vix triente m absolvunt totius argumenti— Adeo tenuia etiam apud nos fuerunt ejus contractus initia, ut non nisi in utuum significaverit, quo magistro peregre agenti permissum est, navem ex causa necessitatis obligare." But still I think authorities are not wanting from the ancient codes: The passage which has been cited from the *Consolato*, art. 105. is applicable. There it is said, that a merchant being on board a ship with his goods (which was the custom, according to the simplicity of ancient commerce); having money was obliged to advance it, for the necessities of the voyage; and if he had not money the master might sell a part of his lading— The ordinance of *Antwerp* likewise seems expressly to recognize it; and the passage of *Bynkershoek* which has been cited, seems to me to be capable of no other interpretation: The passage is very general in its terms, and is by no means limited to the peculiar case in which the owner of the ship is likewise owner of the cargo. The *dictum* is perfectly unqualified in describing the authority of the character of master.

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So far for foreign authorities. Upon the authorities of our own law, it is to be observed, that the power of hypothecation has been but incidentally noticed in the books of the common law, because such bonds are exclusively proceeded upon in the Courts of Admiralty, which can alone give the possession of the *Res*, which is the actual security in dispute. It is principally in attempts to obtain prohibition that the power of hypothecation can be noticed by the common law; and, what is only incidentally noticed in the Courts, is of course but slightly and indistinctly noticed by the Writers. It is of importance, however, that wherever occasion has called for incidental observations on this contract, it appears to have met with countenance.—

A dictum expressly recognizing such a power, appears to have dropped from L. Hardwicke in the case of *Burton v. Snee*, where it is spoken of, as a power arising out of his authority as master, and the necessity thereof, during the voyage, without which both ship and cargo would perish—and as a power, which both the maritime law, and the law of this country allow.

^{1 Vesey Senior, 155.} An earlier instance is that in *Justin v. Ballam*. How that dictum arose does not sufficiently appear; there was nothing, I find, on reference to the books of the Court of Admiralty, in the circumstances of the case, to lead to it, as it was a case of a suit against the ship only, for a cable and anchor supplied in the *Thames*, by merchants of the town. Whether it was a dictum of the Court, or only the counsel, non constat: It might have found its way into the argument, and have received incidentally the countenance of the Court, though, it is true, the report of the same case by L. Raymond makes no mention of it. It is at the very lowest the impression of that reporter,

^{2 Salkeld, 34.}

although the reason assigned for it is expressed in too general terms; for the master does not *ordinarily* represent the owner of the cargo as well as of the ship, but only in cases of accidental necessity, in which the policy of the law throws that character upon him: This dictum, wherever it comes from, derives some confirmation from its reception into the *Digest of Lord Chief Baron Comyns* (tit. *Admiralty* E. 10.), where it is cited amongst the rules of unquestioned authority. I observe that Mr. *Viner* (tit. *Hypothecation*, A.), in citing the case of *Trantor* and *Shippin* (which in other books is denominated *Trantor* and *Watson*), represents Mr. Justice *Powel*, as expressly extending the master's power of hypothecation to the goods; but from a report of the same case (6 *Mod.* 13.), he rather appears to have said no more than that "if the master possessed such a power, it would bind the property in the hands of a third party;" on which it is to be remarked, that although this hypothetical form of speaking asserts nothing directly, it pretty strongly implies, that that able and learned judge, as I have always understood him to be traditionally reputed, did not feel any of his notions of law or equity offended by the supposition, that such a power legally existed. Of *Mollov* I say nothing, knowing well that the authority to which he refers does not sustain him, and that his own authority amounts to little.

These passages are all that I can find affirmatively in the common law writers; but it is no slight negative argument of the understanding of the common law, and no small confirmation of the fitness of this principle, that during a long series of years, no in-

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stance has happened, in which a prohibition to the enforcement of such a contract has issued; and the inference will be the stronger, if it shall appear that numerous suits have actually been entertained in the Court of Admiralty on such bonds. The mention of numerous suits brings me to the result of a research, which I directed to be made in the Records of this Court; a Court whose practice on a question of this nature, a question of the general maritime law, is not without its authority. I find from the list that has been returned to me, that there has been, in later times at least, a constant practice of proceeding upon such bonds, as well against the cargo as the ship. How early this practice may have prevailed, or what may be the most ancient instances of it to be found in these records, has not been ascertained; but I find two instances in the year 1750, and from that time downwards, there is a list of 23 or 24 cases, in which the proceeding has been in some, against the cargo only, in others (and much more generally) against the ship and cargo together: In some of these cases, protests have been entered almost to the extent of the present protest, denying the power of the master to bind the cargo under the circumstances of those cases; but these protests have been either waived or overruled. In the year 1786, there was the case of the *Vier Gebroeders*, in which I was of counsel, and although the decision, as it is said by the King's Advocate, proceeded on other grounds; the fact appeared that the master had exercised this power, and it seemed to be admitted, tacitly at least in the argument, that he possessed generally such a power: It is likewise something in addition to the practice of this Court, that such bonds are frequently occur-

ring in the practice of merchants, being notoriously given and taken; and the practice of merchants in such a matter goes a great way to constitute that *lex mercatoria*, which all tribunals are bound to respect, wherever that practice does not cross upon any known principle of law, justice, or national policy. Adverting therefore to the fair foundation of the general principle, and to the authority of the maritime law, as it has been for some years practised in this Court, and countenanced in all the instances in which it has been brought to the notice of the Courts of common law,—adverting also to the practice of what I may call the *lex mercatoria*, I think I am warranted in pronouncing for the power of the master, to bind the cargo for the repairs of the ship, in order to effect the prosecution of the voyage, in such a manner, as to entitle the party who advances the money to sue for the enforcement of his bond in the Court of Admiralty. At the same time, I think myself bound to observe, that it is perhaps the first instance in which a judgment has been demanded upon this point; and, as I cannot but feel, with particular weight, the insufficiency of the opinion of any one individual to decide on such extensive interests as may depend on this question, in such a commercial country as this, it becomes me to suggest that it may perhaps be not improper, that a resort should be had to the collective wisdom of another jurisdiction.

It remains to consider whether the situation of the master was such as to authorize the exercise of this power, which, I have said, only in the case of a severe necessity, may belong to him; and 2dly, Whether the lender has at all acted unfairly under that

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necessity, by taking undue advantage, so as to vitiate the contract either in the whole or in part; for it must be proved upon the lender, that he has taken such undue advantage: It will not be sufficient, either upon principle or upon determinations of the Court, that the master has taken undue advantage against his employer; that is a matter between him and his employer, with which the third person has nothing to do, unless personally implicated by the facts of the transaction, in the fraud that may have been practised.

The protest of the master states, "that he sailed from *Trieste* with his ship in good condition; that he went to *Venice*, *Zante*, and *Cephalonia*, and took in a cargo of fruit for *London*; that in the course of his voyage to *London*, he met with tempestuous weather, and sprung a leak, so as to make it necessary to unship and reload; that he proceeded to *Gibraltar*, but that a gale of wind sprung up and drove him off from that port without a bill of health; that he approached the bar of *Lisbon*, but was not permitted to enter, on account of his not having a bill of health; that he was proceeding on his voyage, when he was again driven back by tempestuous weather into *Lisbon*, in a state of as complete distress as he could possibly be." What was he to do in this situation? It is admitted that he was not obliged to tranship—if at liberty so to do, still he knew that his cargo was insured in that very ship, and that all his policies might be voided upon a transhipment. To have sold the whole or parts of a cargo, consisting generally of fruit, in a fruit country, would scarcely be thought adviseable. It is said he might have written to the proprietors; but it does not appear that he knew

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who the proprietors were. Those to whom he was to deliver might be mere consignees. The Court would, undoubtedly, be very unwilling to relax the general obligation of masters to correspond with the proprietors, where it is practicable: But, taking the obligation to be such, the master *has* complied with that obligation; he applied to the correspondent of the principal consignee, and through him to the consignee, who is described as owner of a part of the cargo. From him he received an answer sent by that consignee and proprietor, Mr. Powell, expressly declining to give particular directions, and referring him entirely to his own discretion. From that conduct, I think that all the authority that might become necessary for the preservation of the cargo, was devolved upon him by the very act of the consignee, even if he had not possessed it under the general law: For if he was remitted to his own discretion, every thing then which he did under that discretion, justly exercised, was expressly warranted by the act of his employer, so far at least as the interests of that particular employer were concerned. Certain it is, that no such directions, given, or withheld, by that employer, could at all affect the agency of the master, with respect to the other parts of the cargo, in which that employer was not concerned: With respect to them, he possesses the authority which the general law gave him, and no more.

In the state of consummate distress in which he arrives at *Lisbon*, what is this man to do? A great deal of argument has been used to shew what he should *not* have done! I could have wished that a word or two had been employed in shewing satisfactorily what he ought to have done, or could have

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done with more propriety in this situation. It has been said there was the ship and freight. He has acted rightly in binding *both* in this very bond:—It has been added that he might have bound himself. This also he has actually done; though I presume that the mere personal security of such a man, a hired master of a vessel, would go but a little way to satisfy a foreign lender of money.

It is said that he ought to have bound his owners likewise; but those who propose that, should first prove his authority to bind his owners personally beyond the value of their ship (which value he has already bound), and likewise find merchants at *Lisbon* who would be willing to advance money upon the personal security of the owners, living at *Trieste*, whom they might be under the necessity of ultimately following into a personal suit, in the Supreme Court of the Empire.—Then the ship and freight being pledged, and the master having no other funds, and being anxious to convey the cargo to the place of its destination, what could he do better, than hypothecate the cargo, under the reasonable expectation which this case afforded, that the ship and freight, and average expenses falling particularly on the lading, would have been sufficient to discharge the bond, without calling on the cargo? In pursuing this resolution, it was hardly possible for a man to act with more caution than this master appears to have done. He applied not only to the consul of his nation, but likewise to the court of justice in the foreign country. It seems to be the particular regulation of that country, that matters of this nature shall not be transacted without the sanction of a court of justice: As to the policy of that regulation, doubts may be entertained,

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whether it might not be safer to leave matters of this sort to the vigilance and honesty of the parties entrusted, rather than to the superficial attention, which may be given by persons employed to inspect the circumstances of the case by a court of justice. The Court at *Lisbon*, however, proceeded to examine the truth of the representation given by the master; witnesses were examined; surveys under public authority were made; The result was, that the ship is reported by the surveyors to be of sufficient authority to warrant the repairs. The repairs are made, and the master has the authority of the Court, not only for the propriety of the repairs, but likewise for the reasonableness of his expectation, that the ship alone would be able to answer the expense of them. Still, however, the foreign lender was not obliged to advance money, but on such security as he liked; and in this situation the master pledges the additional security of the cargo.—He proceeds on his voyage to *England*; and the bond which became due on the event of his arrival is put in suit: The consequence is, that the ship is sold; and being sold as a foreign ship, unable to procure a register, sells for not more than half the value at which she was estimated at *Lisbon*.

Upon this state of the case, it is evident, that instead of the cargo being sacrificed to the ship, which is the present complaint, the ship has been made the martyr of the cargo. For it is in the service of that cargo, that she has been brought to a place where the owners suffer this extreme diminution of her value.

In her *unrepaired* state at *Lisbon* she is valued at six millions of rees, and therefore would have sold there

About 1,600L

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in that condition for a much larger sum than she produced, after her repairs, by a sale in *England*, for a purpose which absorbs the whole of her value, freight included, and a good deal more. She adheres with fidelity to her engagements with the cargo, and is a victim to the execution of that duty.

On the whole, I am of opinion that the situation and the conduct of the master has been such, as to justify the exercise of that right which belongs to him in cases of necessity, although interests of the owners of the cargo, whose ordinary agent he is not, may be affected by it;—and they must be affected by it, unless it can be shewn, that the other contracting party, the money-lender, was prevented from contracting by any incompetency, which would vitiate the whole of the bond, or that he has fraudulently charged sums, computing the account for which the bond is given, that would vitiate it *pro tanto*.

With respect to the first, it is true that Mr. *Calvert* (who advances the money at *Lisbon*) is the correspondent of one of the consignees of the cargo; and it is argued to be an extraordinary thing, and a proof of collusion on his part, that would constitute a total incompetency, that *he the correspondent* should enter into such a contract. In the first place, it is to be observed, that Mr. *Calvert* is the correspondent of one consignee only; and therefore, with respect to all other interests in this ship and cargo, he is, as far as appears, a mere stranger. Secondly, even with respect to the goods of that consignee, I am still to learn, that it is the bounden duty of a foreign correspondent to advance his money without authority, and without such security as he may approve; and thirdly, This

consignee having declined to give any orders, and having expressly thrown the whole upon the discretion of the master, I think that Mr. *Calvert* stood with respect to these goods, on the same footing as any other merchant; and if the master was driven to the resource of bottomry, nothing in the relation of Mr. *Calvert* to those goods, created an incompetency in Mr. *Calvert* to advance his money on such security, as any other man might have demanded for it.

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There being nothing in the conduct of the parties to invalidate the contract, it remains only to enquire, whether any articles have found their way into these charges, that ought not to have appeared there. It does not appear that many articles are questionable. I perceive there is a pretty heavy commission charged; I know that the word *Commission* sounds sweet in a merchant's ear: but whether it is a proper charge or not on this occasion, I will not take upon myself to determine, without a reference to the Registrar properly assisted. The master, being in a situation of distress, was left to act for the best conveyance of his cargo; and I think he may be fairly supposed to have done so. The bondholder advances the money, having a right to elect his security, and he has run his risk in that security: If the ship and cargo had perished, he would have lost the whole. The owners of the ship have lost all; and there is a great loss besides. On whom is this loss to fall? It can fall only on the proprietors of the cargo, or on the bondholder, who has advanced his money, and run his risk upon the given security, and under circumstances which by no means affect him with incompe-

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tency to enter into such a contract—a contract from which the cargo has received a considerable benefit:—I think that there is no question of the liability of the cargo.

As to some particular goods for which a farther distinction has been taken, on the ground that they are privileged goods, not paying freight, I think that distinction insufficient; they have had in an equal degree the benefit of this conveyance to the place of their destination; and it is not reasonable that they should be exempted from the obligation attaching on the whole cargo, of being amenable for contribution to the bond; although the owner of the vessel might, as far as his interests alone were concerned, have been willing to shew them a particular indulgence. If they are the goods of the owner of the ship, they can have no more right to be exempted from contributing than the ship itself.

Bond enforced against the cargo.

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Rescue of a
neutral ship by
her crew, from
the hands of a
lawful cruiser,
cause of con-
demnation.

THE DISPATCH, ADDISON Master.

THIS was a case of a *Danish* vessel, which had been captured by an *English* cruiser, but had been rescued out of the hands of the prize master by the former master and crew left on board. After the rescue, she had been taken by a *French* privateer, and was again retaken by the original *English* captor, and carried to *St. Domingo*.

On these facts, the King's Advocate contended—
That the forcible conduct of the neutral master and crew, in rising on the original captors, and rescuing the

ship out of their hands, amounted to such an act of hostility as exposed the ship to condemnation.

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On the other side, It was argued, that it was not every fray that might arise between sailors, that could be deemed an act of hostility, drawing down on the proprietor so severe a penalty as the loss of his ship: That the conflict in the present instance was of a slight nature, without arms, and without bloodshed; a mere personal fray, which could not be considered as an act of hostility, sufficient to support the principle of law applied to it.

JUDGMENT.

Sir *W. Scott*—It is admitted, that a rescue had taken place; but it is now represented to have been a mere *civil, peaceable* rescue, by which it is attempted to be distinguished from a *hostile* rescue. I should very much like to be informed, how a rescue can be any thing else, than as the very term imports, a delivery from force by force. That there was this force in the present instance is evident, from the depositions, and also from an affidavit to the same effect which has been brought in since, and which has not been contradicted.

Taking it to be, then, a case of a forcible rescue of a neutral ship from the hands of a lawful cruiser, the law is clear, and the principle of it is founded on the soundest maxims of justice and humanity. If neutral crews may be allowed to resort to violence to withdraw themselves out of the possession taken by a lawful cruiser, for the purpose of a legal enquiry, and may (as it has been termed) *hustle* them

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out of the command of the vessel, the whole business of the detention of neutral ships will become a scene of mutual hostility and contention; the crews of neutral ships must be guarded with all the severity and strictness practised upon actual prisoners of war; for the same measures of precaution and distrust will become equally necessary; the intercourse of nations, neutral and friendly towards each other, will be embittered by acts of hostility mutually committed by their subjects. At present under the understanding of the law which now prevails, it is the duty of the cruiser to treat the crew of an apparently neutral ship, which he takes possession of for further enquiry into the real character of herself and her cargo, with all reasonable indulgence; and it is the duty of neutrals under that possession to take care, that they do not put themselves in the condition of enemies, by resorting to such conduct as can be justified only by the character of enemies. It is the law, and not the force of the parties that must be looked to, as the redresser of wrongs that may have been done by the one to the other. I have no hesitation in pronouncing this ship and cargo liable to condemnation, on the ground of the parties having declared themselves enemies by this act of hostile opposition to lawful enquiry.

THE ADELAIDE, BOSE, Master.

*May 12th,
1801.*

THIS was a case arising on the blockade of *Amsterdam*, respecting the shipment of a cargo at *Amsterdam* for account of merchants in *America*, April and *May 1799*.

Blockade of
Amsterdam—
Time for notice
in *America*.

Farther proof had been directed to be made of the property, and the date of the orders of the several claims,

On the 1st claim, it appeared, that the original order had been given previous to the notification of the blockade, in *February* and *March 1798*. By a letter of the agent, reference was made to a later letter, written by the owner to the agent in *Amsterdam* in *December, 1798*; but no letter of that date was produced.

JUDGMENT.

Sir *W. Scott*—The first question that arises on this claim is respecting the property; whether the goods are to be considered as the property of the merchants in *America*, or of the *Dutch* shipper? The bill of lading expresses it to be the property of the *American* merchants; but the master being a carrier master could not verify; and as it was a shipment made in an enemy's country, it became necessary to order further proof. The proof which has been brought in, consists of the attestation of the owner, and of the correspondence which passed between him and this

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agent in *Amsterdam*, the general tenor of it purporting, that the goods were ordered for his account. If those orders were actually given, and the goods shipped in consequence of them, and for the account of this person, they do, according to our mode of considering the evidence of property, furnish a sufficient constat, that they are the property of the person to whom they are going. There are some expressions in the letters of the agent at *Amsterdam*, which seem to import the feelings of an owner; but perhaps they do not amount to more than an expression of uneasiness, under some reproaches which had been thrown on him for delay, by the second letter of his employer in *America*; they do not perhaps go much farther than that; they by no means overbalance the proof that has been produced. One consideration, which very much weighs, is, that it would be highly improbable that the *Dutchman* should wish to ship off the goods as his own property during the blockade, when he had an opportunity of shipping them for the account and risk of the person in *America*. I think on the whole the proof of property is sufficient.

Then comes the question as to the blockade, whether there was sufficient time for countering the orders that had been given for these goods? and whether the merchant is not bound by the act of his agent? and whether he himself appears to have used due diligence? The question as to the length of time proper to be allowed for notice must depend upon dates. It is a distinction of reasonable equity, and not of partiality or favour to a particular nation, to give rather a more liberal allowance of time for no-

tice, to persons in the situation of merchants in *America*. It is not, I think, to be taken merely on a calculation of the distance;* but with reference also to the accidents by which the general intercourse, even after the allowance of distance, is liable to be retarded.

The first orders were given in *February*, and in *March*, 1798, there appears to have been a second letter of remonstrance against the tardy execution of the orders. It might be supposed by the merchant in *America*, that this remonstrance would produce the effect of accelerating the shipment; and he might expect that the goods were actually *in transitu*. The notification was in *June*, the interval between that time and the shipment was not much more than is allowed in cases of farther proof coming from *America*, nine months.

Under all these circumstances it appears, on the whole, that there has not been time enough to affect the *American* merchant with culpable negligence;

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* Foreign courts of justice appear to have laid down very precise rules for determining questions of presumptive notice. In cases of insurance made on property at a distance, lost or not lost, where the legality of the contract depended on the supposition that no intelligence had been received of any accident, at the time when the insurance was made, they judged by a minute rate of travelling. "Pour induire par le laps du temps, la notice ou connoissance de la perte ou périllicitation, le Consolato, compte heure pour lieue, et le coustomier d'Amsterdam, lieue et demye pour heure. Cleirac, p. 210. So in ecclesiastical matters in the courts at *Rome*: "Pour l'impétration des bénéfices, il est résolu, que les nouvelles de ce qui est fait, ou qui passe à *Paris* peuvent être sceues à *Rome* en sept jours, distant de trois cent lieues l'un de l'autre.—Mais c'est tempore estivo et commodo quo vice sunt faciles, dit du Moulin. Ibid. 211.

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and therefore the only question will be, Whether he can be held responsible, under these circumstances, for the act of his agent in *Amsterdam*? The rule which the Court has already laid down on this point, is, that in cases of agency of persons in an enemy's country, during a blockade, something more than the mere strict principle of law is necessary in order to bind employers by their acts. There must be time to give the principal an opportunity of countermanding. I have stated my reasons for thinking that there has not been sufficient time with respect to this claim, and therefore, I must pronounce that the claimant is not either in respect to proof of property, nor on the ground of the blockade, incapacitated from receiving restitution.

In another claim given for Mr. ——, an *American*, it appeared that the orders under which this shipment was made were given in *October, 1798*, though there had been a previous order in *March, 1798*.

JUDGMENT.

Sir *W. Scott*—In this case, the property is not disputed; but the title to restitution is impeached on the ground that the claimant must have known of the notification of blockade at the time of giving these orders in *October, 1798*; it is argued that as the notification must have been known in *America*, a person giving such orders afterwards is answerable for the effect of this improper conduct, as for a breach of the blockade. The public notification was made in *June, 1798*. There are two obligations which I

must presume fulfilled; unless the contrary is shewn; because they are obligations arising out of the public duties of governments, the duty of making immediate communication to foreign states, on the part of the government imposing the blockade, and the duty of transmitting such communication immediately on the part of those public ministers to whom it is immediately made. I cannot suppose, without very injurious imputation upon the persons entrusted with these great interests, that they did not use the utmost diligence for that purpose: Then, on the strength of these two presumptions, I have only to inquire, whether there is not reason to suppose that the notification so expedited, had reached *America* before the date of the orders in *October*, 1798. It is said that the contrary must be inferred from the terms of the letter, which mention an intention of sending some *West India* produce to *Amsterdam*, without any allusion to the blockade. I do not perceive, that there is any expression in that letter, which absolutely fixes on the parties a knowledge of the blockade; but it would have been more satisfactory to have seen it averred in the affidavit, that it was not known in *America* at that time, and before the orders had actually intervened: considering the dispatch with which such important intelligence would be conveyed, all natural probability is strongly on the side of the presumption, that it must have reached *Charleston* before *October*; and I do not think the presumption is rebutted with sufficient clearness to induce me to depart from it. If the orders were given under a false conception of law, that the blockade would not affect neutral commerce, that will not be a defence. Judging by

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the time which had intervened, I am unavoidably bound to conclude, that the blockade must have been known at *Charleston* at the time of sending the order in *October*. The shipment appears to have been made in consequence of that order, and not under the directions of any former correspondence.—On these considerations, I must pronounce this property subject to condemnation.

In another claim, it appeared that the orders were given on the 8th *September*, 1798.

Court—It would I think be drawing the rule too close, to hold this claim concluded by the time.

Restored.

In another claim, the date of the orders did not appear, but the invoice was dated 25th *November*, and the bill of lading the 30th *November*.

Court—The orders must, I think, have been given so long before, as to entitle this claim to the favourable consideration of the Court.

Restored.

THE NOSTRA SIGNORA DE LOS ANGELOS,
SAXAGOSA, Master.

*May 19th,
1801.*

THIS was the case of a *British* ship that had been taken by a *French* privateer and carried into a *Spanish* port, and sold to a *Spaniard*, in 1795, before *Spain* was at war with this country. Upon coming into the port of *London* in 1796, before the breaking out of *Spanish* hostilities, a warrant had been taken out in the Instance Court on the part of the former owners, and proceedings had been instituted against the ship, as not legally converted by a condemnation to the *French* captor. As it was a ship, apparently a *Spanish* vessel, seized amongst others in port at the breaking out of hostilities, an appearance had been entered for the Crown.

British prize
ship purchased
by a Spaniard of
the French cap-
tor, before hos-
tilities between
England and
Spain, seized in
the port of Lon-
don on Spanish
hostilities : Ap-
pearance for the
Crown : Re-
stored to the for-
mer owner ; the
Crown not being
able to shew that
it had become
Spanish property
under any legal
condemnation
and sale from
the French cap-
tor.

The cause now coming on, the King's Advocate admitted, that the Crown stood in the place of the *Spanish* purchaser; that the *Spaniard* would be called upon to justify his title, by shewing there had been a legal condemnation; that this could not be shewn on the part of the crown, and therefore no opposition was made to the restitution of this ship to the former owner.

May 15th,
1801.

THE JOHN, JACKSON Master.

(Instance Court.)

Warrant against
proceeds in the
registry, on the
part of material
men, sustained :
Prayer for a
warrant on the
part of a general
creditor of the
ship, rejected.

THIS was the case of an *American* ship which had been proceeded against on the part of the mariners, on a demand for wages, and sold under a decree of the Court. The wages had been paid out, and there remained a surplus of about 700*l.* in the registry of the Court.

Swabey now moved the Court on the part of Messrs. *Wright, Anley* and Co. of *London*,* who had

April, 1801.

* Appeared personally *Henry Wright* of *Walbrook, London*, merchant, one of the partners in the house of trade known by the firm of *Anley, Birch, and Wright of London*, merchants, and made oath, that, in the year 1798, the *American* ship *John*, *Robert Jackson* master, being in the river *Thames*, and chartered on a voyage from the port of *London* to *Venice*, with a cargo on freight, and *American* ships being then exposed to capture by the *Algerines*, and also by the *French*, it became expedient that she should be armed for her defence, and also have on board additional stores; that the said *Robert Jackson* the master, applied to this deponent's said house of trade to be furnished with such arms and stores as he stood in need of, and they accordingly furnished him with sundry articles as more particularly appears by the account marked A. hereunto annexed: that the said ship could not with safety and without paying a very heavy premium for insurance, have proceeded to sea on her aforesaid voyage, without the said supply of arms and stores, and which were so furnished to the said ship on the credit of her aforesaid voyage, and on the assurance of the solvency of

supplied arms and stores to the ship on a voyage from *London* to *Venice*, to be permitted to arrest the proceeds remaining in the registry. In support of the application, it was said, that actions of this nature had been formerly very frequent; that although in some cases of *British* ships, prohibitions had been granted, on a suggestion, that the party might ob-

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John Donaldson of the city of *Philadelphia*, merchant; the then owner of the said ship as the deponent believes; that the said ship returned from her said voyage to the port of *London* in the year 1799, having in the course of such voyage met with a *French* privateer, which in consequence of her being armed as aforesaid, she was enabled to resist for some time, but after a severe engagement, the privateer overpowered and boarded her, but afterwards released her without carrying her into port; that in the month of December in the said year 1799, the said *Robert Jackson* applied to this deponent's said house for a further supply of stores, and with which he was furnished accordingly, as will appear by the said account hereunto annexed; that repeated applications were made by this said house of trade to Mr. *John Chuter*, of the Old City Chambers, *London*, agent or broker for the ship, and also to the said Capt. *Jackson*, for payment of the said account, but no part of the same could be obtained from them, or either of them; that the crew of the said ship, not being able to obtain payment of the wages due to them, they caused proceedings to be commenced against the said ship in this Court for the recovery thereof; and under such proceedings the said ship, and also the principal part of the arms and stores furnished for her use as aforesaid, and which remained on board, have been sold, and the proceeds, thereof brought into the registry of this court, out of which the crew have been paid their wages and costs; that he hath been informed, and believes, that the aforesaid *John Donaldson*, the owner of the said ship, hath become insolvent, and the said Capt. *Jackson* is since dead in *America*; by reasons whereof his said house of trade hath no prospect of obtaining payment of what is so due them, on account of the said ship as aforesaid, unless

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tain redress in another Court; the objection did not apply to foreign ships, against which the party could have no other remedy.

Court—I think that circumstance does create a distinction: I shall grant the warrant; but as the Registrar has informed me, that there is already an attachment on the proceeds, on the part of a creditor, it must be understood that the money will not be paid out till the attachment is removed.

On the 8th of June this matter came on again.

Court—I have had the cases on this point looked up; and I find, that it has continued to be the practice of this Court to allow material men to sue against remaining proceeds in the registry, notwithstanding that prohibitions have been obtained on *original suits* instituted by them:—In particular, in the year 1763, I find such a suit was allowed to be prosecuted in the *Adventure, Clap.*

Payment decreed.

June 2d, 1801.—In this case, a second warrant was prayed against the remaining proceeds, at the suit

this honourable Court shall interpose its authority, so as to enable them to receive the same out of the balance of the proceeds, arising from the sale of the said ship now remaining in the registry of this court; and that the account hereunto annexed is a true and just account, and no part thereof hath been received by this deponent's said house of trade, or by any person for their use: but the same now remains justly and truly due, and owing to them.

of a general creditor of a ship, Mr. *Chuter*, on an affidavit,* stating the nature of his demands, for money expended by him on insurances, &c.

The
JOHN.

May 15th,
1801.

1st June 1801.

* Appeared personally *John Chuter* of Bishopgate-street, London, merchant, and made oath, that some time in or about the month of September, 1798, the American ship *John* arrived here from Philadelphia with a cargo, and the said ship was, by *Robert Jackson* the master, put into hands of the appearer, to collect the freights, and do the necessary ship's business as agent; that the said ship was then chartered for a voyage to *Venice*, and the outfit and insurance for the said voyage were paid and disbursed by the appearer; and the appearer, by order of the said *Robert Jackson*, also insured the ship and freight on return voyage from *Venice* to *London*, with liberty to load at *Zante* and *Cephalonia*, and on the ship's arrival, made various disbursements and advances on account thereof, amounting in the whole (as will appear by the account current hereunto annexed, marked A.) to the sum of £5,555 12s. 9d. to which was added, by agreement, on a settlement made with the said *Robert Jackson*, on the 24th day of January 1800, the sum of £400 as a guarantee to the appearer for having become responsible in various actions entered by the seamen of the said ship against the master for the recovery of their wages, leaving a balance in favour of the appearer of the sum of £429. 17s. 9d. that the said sums for which he was responsible have since been ascertained and paid by him, in which was included the costs of the seamen in various actions so by them brought, and there is now justly due and owing to him on a balance the sum of £296. 5s. 10d. exclusive of interest and commission on the same, as by reference to the said account current, will more fully appear; that *John Donaldson* of *Philadelphia*, merchant, the sole owner as he was informed, and believes, of the said ship, is become bankrupt, and the said *Robert Jackson* the master is since dead in *America*; and that he has no person responsible to him in this country, nor any chancery, as he believes, of recovering the balance of his said account, but from the proceeds of the said

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John.

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The Court, on hearing the affidavit read, rejected the petition; observing, that the account was of too general and unsettled a nature to entitle the party to this remedy; that it was more fit for the Court of Chancery: where these cross demands could alone be investigated.—The Court of Admiralty would not attempt to interfere where the demand itself is the subject of a dispute, which the powers of a court of equity are alone competent to settle.

Warrant not granted.

May 16th.
1801.

THE BEAVER, CONNER Master.

Rescue from the
enemy on the
part of the
master and boy,
how considered:
Pretensions as on
derelict, on
the part of a
British frigate
giving assistance
in an anterior
part of the voy-
age, not sustain-
ed.

THIS was a case of a *British* merchant ship taken with a cargo of wine in sight of the *English* coast, by a *French* privateer; when all the crew, except the master and one boy, had been taken out: The master seeing an opportunity rose upon five *Frenchmen* that had been put on board, and by knocking down the

ship, now remaining in the registry of this Court; and that the whole of the said balance is now due and unpaid; and that he paid all the tradesmen's bills and demands against the said ship, save of Messrs. *Ansley, Birch, Wright, and Hill and son, butchers*, who have a demand of about £ 60 to whom he did not consider himself responsible, they being employed by said *Robert Jackson* himself; and this appearer is convinced that the whole of the outstanding demands against the said ship, exclusive of the said Messrs. *Ansley, Birch, and Wright, and the said Hill and son*, does not amount to £ 100.

JOHN CHUTER.

prize master, and possessing himself of his pistols, the only fire arms on board, succeeded in driving the rest of the crew down below, and gained possession of the vessel. After he had steered a considerable time towards the *English* coast, a storm came on, in which the vessel was nearly lost: a *British* frigate coming in sight, the master obtained the assistance of twelve men, by whose aid he kept possession till it was thought she must inevitably perish: They then all returned to the frigate; but the storm afterwards abating, the master requested that he might be permitted to go again to the ship to try if he could not save her; and with the assistance of a boat's crew from the frigate, he succeeded and brought the vessel safe into port.

The
BEAVER.

May 16th,
1801.

On these facts, the King's Advocate contended, That the vessel was to be considered as a derelict saved by means of the frigate; and that it was a case, in which the Court would give altogether, a salvage of a moiety—one sixth to the master, and two-sixths to the King's ship.

JUDGMENT.

Sir *W. Scott*—This is a case of very peculiar merit on the part of the original salvors, the master and the boy, by whose distinguished gallantry the property was rescued out of the hands of the enemy. It is impossible to accede to the representation that has been given on the part of the King's ship, that the vessel is to be considered as a *derelict* saved by *their* exertions. The vessel itself was never in the state of a *derelict*—the eye of the master was constantly upon it; and, if I may so say, kept a possession of it for the whole time,

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BEAVER.

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1801.

under the *spes ac animus recuperandi*. The actual recovery is attributable to him ; he and the boy were the only parties in the first service ; and his advice, seconded by his example, it was, which operated most effectually to the final preservation of the vessel : From the beginning to the end, he is to be considered as most materially active in the whole affair : He is the person whose service must stand highest in the estimation of the Court ; and I do not recollect to have seen any case of salvage in which personal merit of that species presented itself more strongly for encouragement and reward.—On this part of the case, I shall decree at least the usual salvage of a sixth.

With respect to the King's ship, I cannot admit the propriety of the inflamed representation which has been offered of their services : It is the duty of every King's ship, and indeed of every other ship, to give assistance, as well against the elements as against the enemy. It was properly performed in this instance ; but what was the amount of their exertions ? There were two acts ;—one of sending some men on board, on the appearance of the vessel in distress, and the other of sending a cable and anchor with some men, when the storm abated ; acts useful and meritorious, but ranking at the best but moderately in the scale of utility and merit. In these acts of assistance there was no personal danger : To call it a case of derelict, preserved by their interposition, does not accord with any view that I have been used to entertain of the legal nature of a derelict, or of a salvage service applied to property in that situation. The value of the property saved is about £ 6,239—I shall give a sixth of that sum, or £ 1,000 to the master and boy, in this

proportion, £850 to the master, and £150 to the boy; who, I observe, is described "as his apprentice," and rather above the condition of a common sea boy without articles: If half as much, or £500 is given to the King's ship, to be distributed amongst the whole number of persons on board, in the ordinary proportions of a prize distribution, it is the utmost that can be allowed, upon the most liberal justice that can be due to their services. The expense of this application to the discretion of the Court, must be paid by the owners.

The
Beaver.
May 16th,
1801.

THE NEUTRALITET, BURNING Master.

May 16th,
1801.

THIS was the case of a *Danish* ship taken with a cargo of tar on a voyage from *Archangel* to *Dordrecht*. This ship had been a *Dutch* vessel, and was asserted to have been purchased by Mr. *Schultz*, of *Altona*. She then went from *Holland* to *Altona*, and was from thence sent on to *Archangel*, to carry a cargo to *Dordrecht*, under a charter-party made by the asserted owner.

A case of con-
traband affecting
the ship with
confiscation.

JUDGMENT.

Sir *W. Scott*—The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise; and it cannot be denied, that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the

The
NEUTRALITY.

May 16th,
1801.

owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act: But this rule is liable to exceptions:—Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one. The circumstances of the present case compose a case of exceptions also; for it is a case of singular misconduct on the part of the asserted ship owners. They are subjects of *Denmark*, and as such are under the peculiar obligations of a treaty not to carry goods of this nature for the use of the enemies of *Great Britain*.

La Vierge Marie, Lords, 15th July, 1745, 7th August, 1746; the *Swart Kat*, Lords, 19th Dec. 1751.

A reference has been made to ancient cases of *Dantzick* ships, which were restored, though taken carrying masts to *Cadiz*. The particulars of those cases are not very exactly stated; but they were clearly the cases of proprietors exporting the produce of their own territory or of neighbouring parts, without the breach of any obligation but such as the general law of nations imposed. In this instance, the ship was freighted at *Altona*, to go to *Archangel*, for the purpose of carrying a cargo of tar to *Holland*, which is a commerce expressly prohibited by the *Danish* treaty. Tar is an article which a *Danish* ship cannot lawfully carry to an enemy's port, even when it is the produce and manufacture of *Denmark*. This ship goes to a foreign port, to effect that which she is prohibited from

doing, even for the produce of her own country : in this respect, throwing off the character of a *Danish* ship by violating the treaties of her country ; and all this is done with the full privity of the asserted owner, who is the person entering into the charter-party. In such a case as the present, the known ground on which the relaxation was introduced, the supposition that freights of noxious or doubtful articles might be taken, without the personal knowledge of the owner entirely fails ; and the active guilt of the parties is aggravated by the circumstances of its being a criminal traffic in foreign commodities, and in breach of explicit and special obligations. The confiscation of a ship so engaged, will leave the general rule still untouched, that the carriage of contraband works a forfeiture, of freight and expenses, but not of the ship.

The
NEUTRALITY.

May 16th,
1801.

Ship condemned.

THE OCEAN, PARKER Master.

THIS was a question arising on the blockade of *Amsterdam*, respecting a cargo shipped for *America* at *Rotterdam*. It appeared that the persons ordering the shipment, had ordered it of their agents at *Amsterdam*, as a shipment to be made *there*, subsequent to the date of the blockade of that place, but previous to the blockade of the ports of *Holland*. It was argued that in the intention of the claimants it was to be an exportation *actually from Amsterdam*, and that in effect, the trade was the same, as the goods were or-

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1801.
Blockade of
Amsterdam not
violated by an
order from
America, as for
a shipment to be
made at *Amster-
dam*, the actual
shipment having
been made at
Rotterdam :
The interior
carriage of the
articles from
Amsterdam to
Rotterdam, not
within the scope
and operation of
the blockade :
Restitution.

The
OCEAN.

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1801.

dered and purchased at *Amsterdam*, and were to be considered as part of the commerce of that place.

JUDGMENT.

Sir W. Scott—I am inclined to consider this matter favourably, as an exportation from *Rotterdam* only, the place in which the cargo becomes first connected with the ship. In what course it had travelled before that time, whether from *Amsterdam* at all, and if from *Amsterdam*, whether by land carriage or by one of their inland navigations, *Rotterdam* being the port of actual shipment, I do not think it material to inquire. On this view of the case, it would be a little too rigorous to say, that an order for a shipment to be made at *Amsterdam*, should be construed to attach on the owner, although not carried into effect. It has been said from the letter of the correspondent at *Amsterdam*, that the agents there had informed their correspondents in *America*, that the blockade was not intended to prevent exportation: The representation of the enemy shipper could not have availed to exonerate the neutral merchant, if otherwise liable—Were this to be allowed, it would be in the power of the enemy to put an end to the blockade as soon as he pleased. If the general law is, that egress as well as ingress is prohibited by blockade, the neutral merchant is bound to know it; and if he entertains any doubt, he must satisfy himself by applying to the country imposing the blockade, and not to the party who has an interest in breaking it.

It happens in this case, that the intended exportation did not take place. The only criminal act, if any, must have been the conveyance from *Amsterdam*

to *Rotterdam*. It would be a little too much to say, that by that previous act, the goods shipped at *Rotterdam* are affected. The legal consequences of a blockade must depend on the means of blockade, and on the actual or possible application of the blockading force. On the land side, *Amsterdam* neither was or could be affected by a blockading naval force. It could be applied only externally. The internal communications of the country were out of its reach, and in no way subject to its operation. If the exportation of goods from *Rotterdam* was at this time permitted, it could in no degree be vitiated by a previous inland transmission of them from the city of *Amsterdam*. Restored.

The
Ocean.
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1801.

So also in the *Stert, Johnson*, Aug. 4, 1801, the same principle was applied to goods appearing to have been ordered at *Amsterdam*, on the part of neutral merchants, with an original purpose of sending them on to *London*, but sent according to the directions, in the first instance, from *Amsterdam* by an inland canal navigation to *Emden*, and thence shipped for *London*.—Restored.

May 21st,
1801.

Contracts of purchase effected on the part of the belligerent, but left *executory* as to payment and contingent, on a delivery at an ulterior port, at the risk of the neutral merchant, not allowed in time of war: Goods sailing under such a contract, and taken in transitu, held to be the absolute property of the enemy: Condemned.

THE ATLAS, KIMBELL Master.

THIS was a case of an *American* ship and cargo of tobacco, claimed for merchants in *America*. The cargo had been sent originally from *America* to *Vigo*, or a market, consigned to the master for sale;—at *Vigo*, it was sold to the administration of the revenue of tobacco, under a contract of the master to deliver it at *Seville*, at his own risk, and there to receive payment. The ship was taken in the voyage from *Vigo* to *Seville*.

THE
ANTIETAM.

May 21st,
1801.

For, the captors the King's Advocate and Laurence
contended—That this case was decided by the *Sally*,*
Griffiths.

Lords,
Dec. 12th, 1795.

* The *Sally, Griffiths*, was a case of a cargo of corn shipped March, 1793, by *Steward and Plunket of Baltimore*, ostensibly for the account and risk of *Conyngham, Nesbit, and Co. of Philadelphia*, and consigned to them, or their assigns?—By an endorsement on the bill of lading, it was further agreed that the ship should proceed to *Havre de Grace*, and there wait such time as might be necessary, the orders of the consignee of the said cargo (the mayor of *Havre*), either to deliver the same at the port of *Havre*, or proceed therewith to any one port without the *Mediterranean*, on freight at the rate of 5*s.* per barrel on delivery at *Havre*, and 5*s. 6d.* at a second port; the freight to be settled by the shippers in *America* according to agreement.

Amongst the papers was a concealed letter from *Jean Ternant*, the minister of the *French Republic* to the United States, in which he informs the minister of foreign affairs in *France*, “The house of *Conyngham and Co.* already known to the ministers, by their former operations for *France*, is charged by me to procure without delay, a consignment of 22,000 bushels of wheat, 8,000 barrels of fine flour, 900 barrels of salted beef from *New England*. The conditions stipulated are the same as those of the contract of 2d November, 1792, with the *American citizens Swan and Co.* for a like supply to be made to the *Antilles*, namely that the grain, flour, and beef are to be paid at the current price of the markets at the time of their being shipped; that the freights shall be at the lowest course in the ports; that an insurance should be on the whole; and that a commission of five per cent. shall be allowed for all the merchants' expenses and fees.” It has been, moreover, agreed, considering the actual reports of war, that the whole shall be sent as *American* property to *Havre* and to *Nantes*, with power to our government of sending the ships to other ports conditional on the usual freight. As you have not signified to me to whom these cargoes ought to be delivered in our ports, I shall provide each captain with a letter to the mayor of the place.”

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301.

On the part of the claimant, Arnold and Robinson—
argued, that this case was materially distinguishable

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1801.

There was also a letter from *J. Ternant* to the mayor of the municipality of *Havre*. "Our government having ordered me to send supplies of provisions to your port, I inform you that the bearer of this, commanding the *American* ship the *Sally*, is laden with a cargo of wheat, of which he will deliver you the bill of lading."

To the 12th and 20th interrogatories the master deposed, "that he believes the flour was the property of the *French* government, and on being *unladen*, would have immediately become the property of the *French* government."

In the argument it was insisted, *on the part of the claimants*, that the cargo was to be considered as the property of the *American* merchants; that it had been ordered of them, to be supplied and delivered at a certain place; and that under the general principle of law, property was not considered to be divested between the vendor and vendee till actual delivery. It was contended, that the contract remained *executory* till the completion by delivery in *Europe*; that the payment was contingent on the completion of the contract in this form, and that no money had passed nor any compensation or agreement had intervened to produce an absolute conversion of the property; and it was prayed that the Court would admit farther proof to ascertain that circumstance.

Snee v. Prescott,
1 Atk 245.
Lockbarrow's
and Mason 1
H. Black. 359.
Hunter and
Bral, 3 T. Rep.
466.

On the part of the captors, it was replied, that the general rule of law subsisting between vendor and vendee in a commercial transaction, referring only to the contracting parties, and not affecting the rights of third persons, could not apply to contracts made in time of war, or contemplation of war, where the rights of a belligerent nation intervened; that the effect of such a contract as the present would be to protect the trade of the contracting belligerent from his enemy; and that if it could be allowed, it would put an end to all capture. It was said to be a known

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from the case relied on, inasmuch as the contract in the *Sally, Griffiths*, was avowedly made on the part of the neutral merchant, for the purpose of protect-

principle of the prize court, that neutral property must be proved to be neutral at all periods from the time of shipment, without intermission, to the arrival and subsequent *sale* in the port of the enemy; that the twelfth and twentieth interrogatories were framed with this view to inquire, "whether on its arrival, &c. it shall and will belong to the same owner and no other," &c. and a reference was made to the case of the *Charles, Hibernia Wertheim* in 1741, in which the form of attestation was directed to be prepared by the whole bar, and was established in the present form to ascertain the property at the several periods of *shipment*, and *arrival in the enemy's ports*;—in cases where affidavits were to be received to supply the defects of the original evidence, in the place of plea and proof.

The court said—It has always been the rule of the prize Courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemies' property. When the contract is made in time of peace or without any contemplation of a war, no such rule exists:—But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the *American* merchants; but papers alone make no proof, unless supported by the depositions of the master. Instead of supporting the contents of his papers, the master deposes, "that on arrival the goods would become the property of the *French* government," and all the concealed papers strongly support him in this testimony: The *evidentia rei* is too strong to admit farther proof. Supposing that it was to become the property of the enemy on delivery, *capture* is considered as *delivery*: The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's

ing the cargo from capture during the whole voyage from *America* to *France* :—that in this instance the articles came across the *Atlantic* without a view to any specific engagement; that the agreement entered into at *Vigo* for a delivery at *Seville*, at the risk of the master, was a fortuitous circumstance, arising out of the state of the *Spanish* market, and entirely exonerating the proprietors from the imputation of engaging in an unneutral transaction: that on the part of the master it could not be taken in any other light, than as if he, on receiving information of a better market at *Seville*, had shaped his course there in the first instance, as he had the power of doing in an earlier state of his voyage.

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ATLAS.
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1804.

Court—I do not see how this case can be distinguished from the case cited before the Lords: I think I am bound to pronounce this cargo liable to condemnation, on the ground, that it is taken whilst going to an enemy's port, to be delivered there to an enemy, and to be paid for by him, having actually become his property, under an engagement to that effect, entered into by the person who is the appointed agent for the management of the cargo. It came from *America* as *American* property, but was sold at *Vigo* to

property. On every principle on which Prize Courts can proceed this cargo must be considered as enemy's property.

Condemned.

Lords, Dec. 12, 1795.

Present,

Earl of Mansfield.

Sir R. P. Arden Master of the Rolls.

Sir W. Wynne.

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1801.

the Spanish government, and went from thence to Seville as Spanish property ; the contract under which it went was absolute and indefeasible : The goods can be considered in no other light than as the property of an enemy.

Cargo condemned.—Ship restored.—Freight refused,* as on a voyage in the coasting trade of the enemy.

* With respect to the general practice of the British Prize Courts in giving, or withholding, freight to neutral ships, M. Schlegel has thought himself justified in publishing, without stating his authority, the following assertion : " On sait au reste, à l'égard de cette prétendue loi fondamentale et invariable qu'invoquent les Anglois [the *Consolato del Mare*], qu'ils ne daignent pas s'y conformer dans les cas même où ils la font valoir, puisqu'ils ne payent jamais au propriétaires des vaisseaux neutres, le fret que leur seroit dû selon cette loi. Comment appercevoir un principe stable au milieu de ces irrégularités :" p. 58.—So long back as the year 1640, it is asserted on the authority of Sir H. Martin, who was an eminent practitioner and afterwards Judge of the court of Admiralty, that it had never been the practice to condemn neutral ships for having enemy's goods on board *but the freight of the enemy's goods condemned was always paid*. *Sydn. St. Papers*, v. 2. p. 662. In the year 1704, in the Court Books of the Admiralty, there is the case of the *Pearl, Thomson*, in which a question was raised on this point, though the particular circumstances on which the demand was resisted, does not appear. In the result, freight was decreed to the ship, restored on a claim of Mr. Eliason, a Danish merchant, although the cargo claimed for him also was condemned. In the year 1753, in the celebrated answer to the *Prussian* memorial, it is asserted that in the case of ships restored, freight was paid for such of the goods as manifestly belonged to the enemy, and were condemned; and amongst the list of *Prussian* cases referred to, there is a class described, " Ships restored with freight according to the bills of lading for such goods which were found to be the property of enemy, and condemned

THE EDWARD and MARY, TILLEY Master.

June 9th,
1801.

THIS was a case of salvage on recapture of a *British* merchantman, which had separated from her convoy during a storm, and had been brought to by a *French* lugger which came up and told the master to stay by her till the storm moderated, when they would send a boat on board. The lugger continued alongside, sometimes a-head, and sometimes a stern, and sometimes to windward, for three or four hours.

Salvage on re-capture, under the general maritime law—taken out of the act of parliament by the circumstance that the recaptured vessel never came into the possession of the recaptor.

A *British* frigate, the *Arethusa*, coming in sight, chased the lugger and captured her: During which time the *Edward* made her escapé, rejoined the convoy and came into *Pool*; where her papers were some time afterwards demanded of her, by the agent of the *Arethusa*, for the purpose of instituting prize proceedings.

On the part of the Edward, Swabey and Sewell contended—that to constitute a case of recapture, it

a prize." Conformable to the ancient principle of the *Consolato*; and these precedents, has been the invariable practice of the British Court of Admiralty during the last and the present war; unless in cases where some circumstance of *mala fides* occurs; or where the ship is adjudged to have drawn on herself the loss of freight—as a penalty for some act, which, though a departure from pure neutral conduct, has not, according to the practice of the laws of nations, made her liable to condemnation.

A time perhaps may come when the *English* reader at least, becoming more familiar with the principles of the law of prize, and its historical consistency, as it is administered in the High Court of Admiralty of this kingdom, will be better able to appreciate the accuracy of such works as that of Mr. Schlegel, which has occasioned the Reader the trouble of this Note.

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was essentially necessary there should be an actual capture, or taking possession by the enemy; that no such thing happened in this case. That the facts of this case did not make it a case of recapture within the meaning of the words of the prize act, and the cases of the *John* and the *Exeter* were relied on as similar instances in which the Court refused to give salvage.

JUDGMENT.

Sir *W. Scott*—I entertain a different view of the cases that have been cited as cases in point. They were the cases of two colliers, that were from the first incapable of making any resistance: one was taken; the other appearing in sight drew off the attention of the enemy, and, during the chace the *French* ship blew up. There was not even the merit of intention in that case:—Every thing that was done was the mere effect of an independent casualty; There was nothing on which any plea of merit could be constructed. The present case is of a very different cast: for in this case the *Arethusa* came up for the very purpose of taking this *French* captor, if he is to be so considered, and actually took him; and it is owing to this act of the *Arethusa* that this vessel was rescued from his grasp. The master, I must observe, has given an improper deposition, and very ill according with the entries in his log-book: By that it appears that the *French* vessel brought him to, and declared herself a *French* privateer, and ordered him to lie to; but owing to the boisterous state of the weather, she did not send a man on board. I can by no means agree to what has been advanced in argument,

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that it was on this account *no capture*. The sending of a prize master on board is a very natural overt act of possession, but by no means essential to constitute a capture.—If the merchantman was obliged to lie to and obey the direction of the *French* lugger, and await her farther orders, she was completely under the dominion of the enemy; there was no ability to resist, and no prospect of escape. The *Frenchman*, who has been examined, appears to have given the true account: He says,—“that he understood it to be a capture.” There have been many instances of *capture* where no man has been put on board, as in ships driven on shore, or into port. I remember particularly a famous case of a small *British* vessel armed with two swivels, which took a *French* privateer row-boat from *Dunkirk* that had attacked her; the *British* vessel having only three men on board, and no arms but the swivels, was afraid to board the row-boat, which was full of men armed with muskets and cutlasses; but by the terror of her swivels she compelled their submission, and obliged them to go into the port of *Ostend*, then the port of an ally, she following them all the way at a proper distance.

The only question will be, whether it is a case of salvage under the act of parliament, on another ground, *viz.* that the vessel never came into the actual and bodily possession of the *recaptor*—I rather incline to think it is not. The terms of the act of parliament,* “if at any time afterwards *surprised* and *retaken* by any of his Majesty’s ships of war,” &c. seem to point to a case attended with the circumstance of an actual possession taken. But if it is not

* Vide infra,
p. 310, Note.

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a case of recapture under the act, it is however still a case of salvage, under the general maritime law, and shall give the same reward as if it had been under the act of parliament.

One eighth salvage given.

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THE APOLLO, VEAL Master.

Salvage on re-
capture of a
vessel cut out
from under a
French battery;
Distinctions to
take it out of
the act of par-
liament for the
purpose of in-
creasing the sal-
vage, over-
ruled : An
eighth given.

THIS was a case of salvage on recapture of a *British* prize ship, that had been cut out from under a battery on the *French* coast, by his Majesty's ship of war the *Trent*, Sir Edward Hamilton commander.

The King's Advocate and Sewell contended—That the prize act referred only to recapture at sea, that this case being a recovery out of the port and country of the enemy, was not under the limitation of the act, as to the amount of salvage, and that the Court would be induced to give a greater proportion than one sixth, as a reward for the spirited and gallant exertions of the recaptors. It was said further that there had been a resistance made, which was to be taken as equivalent to a fitting out for war; in which case the recaptor would be entitled to the whole benefit.

On the other side, Swabey—If it can be shewn that it was fitted out for war, it would be condemnable as prize undoubtedly; but that must be shewn in a more specific manner. The words of the act as to recapture are general, and not particularly confined

to the open sea ; though this particular recapture must have been made on the open coast, and in a place accessible by sea.

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Sir W. Scott—The act of parliament is certainly drawn with no overflowing liberality towards recaptors. It is within my recollection, that in the framing of the act it was thought fit that a greater reward should be held out to recaptors, as an encouragement to exertions of that nature ; but other opinions prevailed, and the legislature contented itself with the regulations as they now stand : There may, however, be cases not within the act, in which the Court would be left to exercise its own judgment and discretion under the general maritime law.

The question will be, whether this case is within the act—and if so, whether there are any expressions in the act which can be said to distinguish different exertions of gallantry in the service of the recapture : It is, I think, admitted, that the act acknowledges no such distinctions ; all recaptures within it are put on the same footing of merit and reward ; therefore all that is said on the peculiar gallantry of the service performed, is foreign to any singularly favourable application of this act, which has provided but one measure for all cases without reference to circumstances.—Still less can it be admitted to have the effect of taking such a case out of its reach.

It is, however, said, that the locality of the capture is sufficient to constitute it an excepted case, because the capture was made, not upon the high seas, but in the very port of the enemy. If the terms of the act enabled the Court to admit this distinction, assuredly

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it would not be sorry to adopt it. It is not unreasonable, because the risk encountered is manifestly greater. But I find no sufficient ground in these terms for so doing: The act expresses itself very generally, "retaken or surprised,"* without a limitation to the high seas or otherwise; and perhaps the last word "surprised," if it is to have any distinct meaning, may have a meaning pointing to a case of this very nature: But if it has not, still I see nothing that authorises any distinction arising from the place of recapture; and I fear that the mere policy of distinguishing such cases will not justify me in assuming it as a ground of decision, if the legislature has not thought fit in any manner to acknowledge it. The Court is bound to pronounce for the usual salvage.

One eighth salvage given.

* Ar. 42. If any ship or vessel, or boat taken as prize, or any goods therein, belonging to his majesty's subjects which were before *taken or surprised* by any of his majesty's enemies, and at any time afterwards again *surprised* and *retaken* by any of his Majesty's ships of war, or any privateer, or other ship, vessel or boat under his Majesty's protection and obedience, &c. &c. they shall be restored to the former owner on salvage of one-eighth to king's ships, and one-sixth to privateers, and other ships, vessels, and boats, &c. &c.

THE FORSIGHEID, WILLEDSSEN Master.

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THIS was a case on the admission of an allegation of joint capture on the part of Admiral *Dickson's* fleet, claiming to share in a capture made by the *Director* and some other ships, belonging to the same fleet, but sent to cruize at a certain distance by orders from the Admiral, with particular directions *not to be out of sight*. It was alleged, that the distance of the place of capture was not above eight or nine miles from the fleet; but, that owing to a fog or haziness that came on, they were not in sight of the actual captors at the time of the capture.

*Allegation of joint-capture on part of the fleet;
Capture out of sight: Actual captors being ships associated on a particular service, with orders not to be out of sight;
Allegation admitted.*

For the actual captor, the King's Advocate and Arnold—To entitle persons to share as joint captors, there must be some assistance, either actual or constructive. No instance can be produced in which the Court has pronounced for a joint captor, who never saw the captured ship, nor was ever within the knowledge or contemplation of the persons captured. The first three articles of the allegation state, that the several parties in this case were parts of a fleet employed under the orders of the Lords of the Admiralty to keep up the blockade of *Holland*; that the ships, which were the actual captors, were detached by Admiral *Dickson* to cruize nearer shore. The fourth article states the circumstances of this capture—"That the ships so sent nearer to the shore cruised from daylight till half past five o'clock in the morning in sight of the fleet, at the distance of

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about five miles, but were soon afterwards out of sight until half past nine, by reason of an intervening haziness ; that between the hours of five and nine, the detached ships met with and detained the vessels in question ; and that at that time the fleet were not at greater distance than ten or twelve miles, and were sufficiently near to have heard the report of the guns, had any resistance been made ; and were in a situation to have immediately joined in battle ; and were at the time of the said capture co-operating with the said detached ships in the general purposes of the blockade."

These circumstances are insufficient—The parties must maintain one of these two grounds, either that there was a *particular* and *continued* association and co-operation ; or that there was an intervening haziness, which came on and partially obstructed the view, after the prize in question had appeared in sight :—In the latter instance, perhaps, a temporary and accidental interception of sight might not frustrate the operation of a constructive assistance previously effected. The association, which is stated in this allegation, is not of a nature that can supply the defect of sight, and sustain a claim of joint capture : A detachment had been made, and not on any joint service, as a detachment to chase, or to effect some common purpose, *after sight* and *before the surrender*. In all other cases, detached ships (*a*) have been considered as taking for themselves, and not for the common interest of others, associated perhaps in a general sense, but not co-operating in the actual capture.—But other circumstances are thrown in : It is alledged, that the distance was not more than ten or eleven miles, and

(a) *The Mars*
vide supra,
vol. 2, p. 22.

that sight was prevented *only* by the intervention of a fog.—That might, perhaps, operate in a case of joint chasing; a neck of land interposing, or darkness, or haziness, might not then exclude the party from sharing, who had till that moment been engaged in the chase; and for this reason, that his situation might still be within the knowledge of the enemy, and might operate to his intimidation; and so it was decided by the judgment of the Lords last war in the case of a *Bristol* privateer.* But no such consequence can have arisen from the situation of the fleet in the present case; it was a detachment made long before the enemy appeared in sight; and it is not alledged that the fleet now setting up a claim of joint capture, had ever been in the contemplation of the captured ship: on these grounds they cannot be entitled to share.

For the allegation, Laurence and Swabey—This is a case of very considerable importance to the navy, and to the public, in respect to services similar to that on which the present question arose. The principal article of our allegation exhibits a case very different from cases of detachment, or general association. The actual captors were not detached from the body of the fleet, but sent to cruize as *an advanced guard*, to a certain point, with particular directions, “to watch the signals of the fleet, and never be out of sight.” In the course of that service, the

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The Eddraught,
Lords, 14th
March, 1788.

* As a reference is frequently made to this case, on account of the particular circumstances attending it; the principal facts of the case will be found abstracted in the Appendix, with the determination of the Court of Appeal.

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ships so sent to a certain distance only from the fleet, on the look-out, met with five vessels, of which the whole fleet had before received intelligence, though at that time they were not within sight, owing to an accidental haziness which came on. If the capturing ships had been out of sight, otherwise than in consequence of this accident, they would have been in contravention of the orders by which they are said to have been detached. This is a very different case from that of a fleet at sea, from which detachments may be sent to any distance, on services wholly unconnected with the particular operation of the whole fleet: The general effect of annoying the enemy may be performed by separate detached cruisers, which, though joined in the common purpose, may be entirely distinct and unconnected in their particular operations;—such detachments, therefore, are as different as possible from the present case; of which, the main circumstance is, that it is a capture of vessels, for which the whole fleet were looking; and made by ships which remained at the time an efficient part of the whole fleet, with express orders not to be out of sight. The case of the *Mars* also, to which a reference has been made, was of a very different description: In that case, three ships thought proper to join in a common adventure, taking distant stations for the purpose of making the capture more secure. They were not united by any public authority; and they had taken their station out of sight, and at such distance, as to have retained no power of co-operating together in any engagement: There is no resemblance between that and the present case; neither is there any case similar to the present to be found.—The

establishment of such a precedent as is contended for, on the other side, might be of the most disastrous consequence to the public service; if commanders could be influenced by private views to consult their own advantage before the public interests; and if they should be taught to consider detachments of this nature, however serviceable, as so many sacrifices of the share that might accrue to their fleet; as long as there was any chance, though more uncertain, of effecting the same object by the whole fleet. It is highly important, on these grounds, that the question should be brought forward, for the purpose of receiving the direction of the Court as early as possible.

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JUDGMENT.

Sir *W. Scott*—This is undoubtedly a convenient method of taking the opinion of the Court on facts stated and admitted in the allegation, and on the arguments deducible from them, in order that it may be decided as expeditiously as possible, whether the law arising from the facts, if proved, would entitle the parties to the benefit they claim.

The facts stated on the part of the opponent to this allegation are, that the ships making the actual capture composed part of a squadron employed in the blockade of the *Texel*; but that it appears upon the shewing of this very allegation, that at the time of the capture they were detached on a particular service, connected indeed with the main purpose of the blockade, and subordinate to it, but still a distinct and separate service, it is admitted, that the capture was made *out of sight* of the fleet; and, what is more,

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without any concurrence in chasing; in fact, that the captured ships were not seen by the fleet, till they were in the possession of the actual captor. The question is, whether on these facts, which seem to be mutually agreed, the fleet is entitled to share.

Undoubtedly, different principles apply in cases where ships are associated by public authority on a common service, and where they are not so associated together. In the latter case, where a capture is made by ships, not associated by public authority, for a common service, it could not be maintained on any principle, that the mere circumstance of being within such a distance as would bring them within sight in clear weather, would entitle them to share, when in fact they *were not seen* at all. It would put this rule of law on a very uncertain footing indeed, unconnected with all rational principle, as well as incapable of all satisfactory proof, if the Court had to determine on the state of the atmosphere, and on the loose conjectural evidence that might be applied to ascertain such a state; whether the distance was a proper distance for sight, if the weather had been clear; and what under such a state could be the impression on the mind of the enemy or the friend. It is essentially necessary, in such cases, that the party should have *been in sight* at some part of the transaction, though it is not required, that it should be at the moment of capture, because the impulse and impression on the mind of the enemy who is to be intimidated, or of the friend who is to be encouraged, may remain, notwithstanding the intervention of a headland or fog; and may therefore bring it within the reach of that principle of law, on which constructive

assistance is built. But in cases of ships associated together by public authority the same principle does not necessarily apply. It will not be denied, that if one ship of a squadron takes a prize in the night, unknown to the rest, it would entitle the whole fleet to share, although possibly the capture might have been made at a distance out of sight of most of the ships of war, even if it had been noonday; for the fleet so associated is considered as one body, unless detached by orders, or entirely separated by accident; and what is done by one continuing to compose *in fact* a part of that fleet, enures to the benefit of all. In the present case, no accidental separation is suggested;—The only question is, whether or not the capture was made, whilst those ships composed, *de facto*, a part of this fleet.

The whole case then is reduced to this point, whether these ships are to be considered as detached or not? *detached* I mean in the same manner as detachments are usually made, for some distinct and separate purpose; which, though possibly connected with the main service, carries them out of the scene of common operation for the time; or whether they were sent only on the look-out, to preserve their connexion with the service of the fleet, and maintain their dependence on it? To determine this question, I must look to the orders that were given: They direct them “to watch well the motions of the enemy, to cruize between certain points, joining the fleet occasionally for communication.” If they stopped here, I should be inclined to hold, that it was a separate service, with orders to join again: but they go on,—“directing them to avoid being at such a distance, *as not to ob-*

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serve the signals that were made." It is impossible, under these terms, to say, that it was a detached service. It is more like the stretching out of the arms of the fleet, without dissolving in any manner the connexion between them and the main body: From this very circumstance, a presumption strongly arises, were it necessary to consider the probability of that fact, that the fleet would *have been actually in sight*, if an accidental haziness had not intervened. On the whole of the case contained in this allegation, I am of opinion, that the fleet is entitled to share; and on the same principle by which it would have shared in a capture made by one of its own ships, not sent off under such an order.

Allegation admitted.

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Allegation of a joint capture, on the part of the fleet associated in the blockade of Holland:

Actual captors detached on that service: Capture out of *sight*, nearer to the shore where the large ships could not ride.

Allegation admitted, but referred to proof.

HARMONIE, DEBOER Master.

THIS was a case on the admission of an allegation on the part of several ships composing a squadron employed in the blockade of *Holland*; claiming to share in prize, made by small vessels sent from the fleet to keep up the blockade of the *Texel*, nearer to the shore, where the large ships could not ride. It was alledged that the *Scorpion* and the *Fox* were sent by Capt. *M'Doual*, commander of a squadron employed in the blockade of the *Texel*, as small vessels that drew less water, to cruize for the purpose of keeping up the blockade nearer in upon the coast, where large ships could not safely venture, on account of the shoals. It was admitted that the capture was made ten leagues from the fleet, after a chase of three or four hours, and completely out of sight.

On the part of the actual captor, the King's Advocate and Territ—This is not merely a case of wider elongation, different from the last only in point of distance ; it is a case of a capture made by ships completely detached : The actual captors were small vessels, that were frequently sent off to *Yarmouth* with dispatches, or for provisions, and were much in the habit of being entirely detached. The service on which they were now employed was of this nature :—They were sent to a considerable distance, undeniably far out of sight, and without any orders that have been produced, respecting the keeping up any connexion with the fleet. The only orders that are asserted to have been given, were “to bring all prizes up to the squadron ;” but they did not actually reach the squadron in this instance, till the evening of the next day after capture. All possibility of co-operation is negatived by this circumstance :—The proceedings of the present claimants in joint capture, are a complete answer to their own pretensions. It was not till two years after the capture, and till after condemnation had passed to the actual captor, that a claim was given on the part of the fleet ; and after many instances had occurred of prizes condemned to the fleet, in which these ships have not been admitted to share.

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In support of the allegation, Laurence and Swabey—It is not denied, that the distance of this capture from the fleet was considerable and beyond sight : but the main circumstances on which the claimants rely is the associated nature of the service, by which these ships were still kept dependant on the fleet.—It is, in this respect, perfectly distinct from cases in

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which there had been no association at all, except in the more enlarged sense, in which the whole navy of *England* may be said to be associated. The *Scorpion* was directed to go nearer into the shore, under the command of the *Fox* cutter, with particular orders "to bring all prizes up to the squadron;" till that time it was not a complete capture. If the captured vessel had appeared to the commander to have been violating the blockade only in consequence of necessity or distress, she might have been released; and on such a service, it is particularly important that the discretion should not be separated from the commander, and placed in the hands of subordinate persons. The commander might have directed them not to make prize at all: the orders actually given were "to bring the vessels to the fleet;" and the very circumstance, that these orders were not in writing, but merely verbal, affords additional ground for supposing, that there was no detachment of any part of the force intended.

JUDGMENT.

Sir *W. Scott*—I should be extremely glad to receive more information respecting the circumstances of this case, if it is desired, and if it can be obtained; otherwise, I am ready to give my opinion on the admissibility of this allegation in point of law, on the facts that now appear before me. If it appeared against the gentlemen asserting an interest in this capture, that they have not shared the prizes they took with the actual captor of these vessels, I should think they had very strongly bound themselves against the fairness of their present demand; for they cannot be entitled to share in his captures, unless he is entitled

to share in theirs—But on any other grounds I should not be disposed to reject it; for the view that I should be inclined to take of such facts, so stated, would be, that the fleet *might* be entitled. The admiral sailed under orders from Lord *Grenville* to form the blockade of *Holland*; it being found hazardous for large vessels to be so near the shore, the *Fox*, under captain *Balfour*, was sent nearer in, with smaller vessels, and with particular orders, “to bring up all vessels attempting to break the blockade.”

On these facts, the question is, whether it was a distinct and separate service? If it is to be so considered, I think the fleet would not be entitled: For instance, if the commanding officer was to send off vessels for provisions, or to carry dispatches, it might be a service connected with the blockade, but still it would be a separate and distinct employment, carrying them to a different point; and if on such a service, the commanding officer was to say, “If you meet with any enemy’s vessels bring them to the fleet,” I do not say that he would at all exceed his military authority in so doing, but he would not entitle himself to any share in the prizes so taken and brought to the fleet.—But, if there was *no* separation of service; if the service was identically the same, it does not appear to me, that the connexion is so broken as to destroy their mutual or common interest. Then, is this to be considered as a separate service? It is not merely a service *connected with the blockade*, but it is the *blockade itself*, which the fleet was sent to form; the smaller ships, which draw less water forming the interior tier, as I understand it, and the ships of the line the outer; and though possibly out

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of sight on that account, yet all employed in one common undistinguishable service, having no one object immediate or remote, but the formation and enforcement of this blockade.—Of course, ships attempting to break the blockade, *ab extra*, would fall first into the hands of the large vessels; those that attempted to violate the blockade by egress, would be intercepted by the smaller ones within. Directions were given to them to bring all such vessels breaking the blockade, up to the fleet; until that was done, it was not properly a capture, but detention. On this view of the matter, I should be disposed to hold that there was no real separation, and therefore that the allegation is entitled to be admitted.

But if the fact shall appear to be, that there had been no propounding of this interest whilst the original cause was depending for adjudication, and that in cases of captures made by the fleet this captor has not been permitted to share, I shall be very unwilling to entertain this suit.

On a subsequent day, November 18th, 1801.—This matter was introduced again, when an amendment was directed to be made in the allegation, by the omission of the word “detached;” the Court being of opinion, that the word was liable to be misinterpreted to express more than is really described to have been done.

Allegation admitted—but referred to proof.

On the 22d Feb. 1802, an allegation was offered (and admitted) on the part of the actual captors, averring a different representation of facts, with a view of defeating the ground of association, and employment in the identical service of the blockade, by which the Court had thought that the squadron *might be* entitled to share, though out of sight. Vid. Appendix.

THE AMERICAN HERO, LINDSEY Master.
 (Instance Court.)

June 20th,
 1801.

THIS was a question of salvage, respecting an *American* ship and cargo, designedly run on shore for safety near *Kingsgate* by the master, acting with the assistance and advice of some *Deal* boatmen. The petition on behalf of these boatmen recited the facts, and prayed that they might be rewarded as salvors.

Salvage settled
by the Commiss-
ioners of the
Cinque Ports, by
12 Ann. s. 2.
c. 18. 26 Geo.
2. c. 19. s. 10.
their award
need not be in
writing.

On the part of the owners, it was said that this demand had already been settled before the Commissioners of the Cinque Ports.

On the other side, the King's Advocate—It may be questioned whether the Commissioners of the Cinque Ports have any authority to settle demands of salvage arising on the high seas. In cases of service performed on shore, or in cases of stranding, they have a similar power with justices of the peace: But the service relied upon in this case was performed on the high seas, by men who went out at the peril of their lives, and assisted in running the ship on shore.

Swabey—In cases where salvage is settled under the statute* (which gives a power to the commissioners of the Cinque ports to determine questions of salvage), the decision should be in writing. The Court will not enquire whether the party has been heard, but whether there has been a competent determination.

* 12 Ann. s. 2. c. 18, extended to the Cinque Ports by stat.
 26 Geo. II. c. 19. s. 10.

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Arnold denied that the act directed the sentence to be in writing.

Swabey—It has usually been so in practice.

Court—It is said, that the parties were not compelled to go before their commissioners; but it appears that they went voluntarily, and having so done, it is fit they should abide by the award. I do not know that I am bound to require that award to be in writing. As there seems to be some disagreement respecting what passed on that arbitration, I shall direct notice to be sent to the commissioners, that they may make their return.

On the 1st *July*, an affidavit from the commissioners was exhibited, stating that they had heard all the parties, and dismissed the application.

Court—I shall dismiss it likewise.

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THE HURTIGE HANE, DAHL Master.

Blockade of
Amsterdam:
Merchants of
the African
States not ex-
empted from the
observance of the
law of blockade,
though in some
instances they
may be entitled
to a more relaxed
application of
the law of na-
tions: Cargo
condemned.

THIS was a case arising on the blockade of *Amsterdam*, respecting a cargo shipped at *Saffee* in *Barbary* for *Amsterdam*, under a false destination to *Hamburg*. See 2d Adm. Rep. p. 124.

On the part of the claimant, Laurence and Sewell argued—That there was nothing to affect the shippers at *Saffee* with a knowledge of the blockade; that it had not been notified to the government of *Morocco*. It was prayed that the Court would permit farther proof to be introduced to shew that the shippers

were ignorant of the blockade at the time of the shipment of this cargo.

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HURTIGE
HANZ.

1801.
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JUDGMENT.

Sir *W. Scott*—This is the claim for the cargo of a ship which has already been determined to have been going into *Amsterdam* on the 8th *April*, 1799, a considerable time after the blockade of that port. It may be material in the present view of the matter as affecting the cargo, to advert to the former judgment on the ship, and consider all the circumstances attending the capture. The master said, “that his destination had always been for *Hamburgh*, till his crew compelled him to change his course for *Amsterdam*” so that almost up to the moment of capture the destination was held out to be to *Hamburgh*. It now appears that the ship was freighted at *Lisbon* on a charter party effected there on the 26th *Nov.* 1798, by Mr. *Delamer* of that place, to go to Mr. *Delamer* at *Saffee*, and carry a cargo from thence consigned to Mr. *Delamer* of *Amsteruam*; these gentlemen being brothers and Jew merchants settled at different places, but keeping up a very intimate connexion and correspondence with each other. It has been argued, that it would be extremely hard on persons residing in the kingdom of *Morocco*, if they should be held bound by all the rules of the law of nations, as it is practised amongst *European* states. On many accounts undoubtedly they are not to be strictly considered on the same footing as *European* merchants; they may on some points of the law of nations, be entitled to a very relaxed application of the principles, established, by long usage between the states of *Europe*, holding an intimate and constant intercourse with each

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other. It is a law made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system, which is not familiar either to their knowledge or their observance. Upon such considerations, the Court has, on some occasions, laid it down that the *European* law of nations is not to be applied in its full rigour to the transactions of persons of the description of the present claimants, and residing in that part of the world (2d Adm. Rep. p. 88.) But on a point like this, *the breach of a blockade*, one of the most universal and simple operations of war, in all ages and countries, excepting such as were merely savage, no such indulgence can be shewn: It must not be understood by them, that, if an *European* army or fleet is blockading a town or port, they are at liberty to trade with that port. If that could be maintained, it would render the operation of a blockade perfectly nugatory. *They*, in common with all other nations,* must be subject to this first and elementary principle of blockade, that persons are not to carry into the blockaded port supplies of any

* It may, perhaps, be not acceptable to the reader to be put in possession of the regulations, which the States of *Holland* issued for the enforcement of blockade, imposed by them so long ago as the year 1630.

**Extrait du registre des résolutions des Seigneurs Etats Généraux
des Provinces Unies. Mercredi, le 26 Juin, 1630.**

“ Les Etats Généraux des Provinces Unies ayant revu and pesé les positions des cas ci à côté, ont après une meure délibération préalable & sur l'avis des respectifs Colléges de l'Amirauté trouvé

kind : It is not a new operation of war ; it is almost as old and as general as war itself. The subjects of the *Barbary* states could not be ignorant of the general rules applying to a blockaded place so far as concerns the interests and duties of neutrals.

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bon & entendu à l'égard du premier point, que les vaisseaux neutres, qu'on trouvera qu'ils sortent des ports ennemis de *Flandres*, ou qu'ils y entrent, ou qu'ils en sont si près qu'il est indubitable qu'ils y veulent entrer, que ces vaisseaux avec leurs marchandises doivent être confisqués par sentence des susdits respectifs Collèges, et cela à cause que leurs Hautes Puissances tiennent continuellement lesdits ports bloqués par leurs vaisseaux de guerre à la charge excessive de l'état, afin d'empêcher le transport & le commerce avec l'ennemi, & parce que ces ports & ces places sont reputez être assiégées ce qui a été de tout tems un ancien usage, selon l'exemple de tous les rois, princes, puissances, & autres républiques qui se sont servis du même droit dans de semblables occasions.

“ A l'égard du second point, leurs Hautes Puissances déclarent, que les vaisseaux & marchandises neutres seront aussi confisqués quand il constera par les lettres de cargaison, cônnoissements, ou autres documents, qu'ils ont été chargés dans les ports de *Flandres*, ou qu'ils sont destinés d'y aller, quand même on ne les auroit rencontré que bien loin encore de là de sorte qu'ils pourroient encore changer de route & d'intention. Ceci étant fondé sur ce qu'ils ont déjà tenté quelque chose d'illicite, & mis en œuvre, quoiqu'ils ne l'ayent pas achevé, ni porté au dernier point de perfection, à moins que les maîtres & les propriétaires de tels vaisseaux, ne fissent voir dûment qu'ils avoient désisté de leur propre mouvement de leur entreprise & voyage destiné, & cela avant qu'aucun vaisseau de l'état les eût vus ou poursuivis, & que ceux ci trouvassent la chose sans fraude : ce qu'on pourra juger en examinant la nature de l'affaire par des conjectures, les circonstances, & l'occasion.

“ A l'égard du troisième point, leurs Hautes Puissances déclarent, que les vaisseaux revenant des ports de *Flandres* (sans y avoir été jetés par une extrême nécessité) & quoique rencontré loin de là dans le canal ou dans la mer du nord, par les vaisseaux de l'état quand même ils n'auroient pas été vus in poursuite par ceux

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nounce, that the claimants have been convicted of a contravention of that law, and that these goods are liable to confiscation.

THE SARAH, SMITH Master.

June 24th.
Prayer to admit extraneous evidence on the part of the captor; to shew an illegal course of trade, not grapted,—
there being nothing in the original evidence pointing to such a suspicion.

The Court of Admiralty is at all times studious to preserve the simplicity of prize proceedings.

THIS was a case of a cargo of *Dutch* butter shipped at *Embden* for the account of several persons in *London*. The orders had been taken from these persons by Mr. *Foss* of *London*; and by him transmitted, as it was said on the part of the captor, to his agent or partner in *Holland*. The ship had sailed outward from *London* to *Embden*, and on that voyage had been stopped and searched; and a letter had been taken out by the cruizing vessel—It was now prayed, that the Court would admit this letter to be introduced on farther proof; on a suggestion, that it was written by Mr. *Foss* to Mr. *Harrison* at *Rotterdam*, and would shew this trade to have been carried on with the enemy's country by the mediation of agents in *Embden*; and that Mr. *Foss* had directed the person at *Rotterdam* to have a cargo ready for this ship.

JUDGMENT.

Sir *W. Scott*—This is an application on the part of the captor to introduce evidence on an order for farther proof. That the Court does accede to applications of this nature, in certain cases, cannot be

denied ; but it is by no means the disposition of the Court to encourage them : It has seldom been done except in cases where there has appeared something in the original evidence, which lays a suggestion for prosecuting the inquiry farther.—In such cases, the Court has allowed it ; but when the matter is foreign, and not connected with the original evidence of the cause, it must be under very particular circumstances indeed, that the Court will be induced to accede to such an application ; because, if remote suggestions were allowed, the practice of the Court would be led away from the simplicity of prize proceedings, and there would be no end to the accumulation of proof that would be introduced, in order to support arbitrary suggestions. It appears that the goods were *shipped at Embden*. A reasonable presumption arising from that fact is, that they had fairly found their way thither. The Court is extremely disinclined to go out of the case that is immediately brought before it, and to mount up to the first possible terms of a transaction : Although on some occasions it may be necessary to do so.

The cargo in question was coming from *Embden*, to be delivered in *London*, and documented as the property of persons at *Embden*; whether it does in reality belong to *them*, or to persons in *London*, it will be equally a case for restitution.—The papers represent it as the property of *Abegg of Embden*; but it is claimed for persons in *London*; and it is said, that the name of *Abegg* was used for the purpose of protecting it from the cruisers of the enemy ; an artifice, which this Court is not very scrupulous to detect, where it does not appear, that there is any

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sinister purpose concealed under that pretence, or that any enemy's interest is concerned. Farther proof was necessary, however, to account for this variation between the shipment and the claim ; it is now brought in ; and I am disposed to think that it is sufficient.

But it is said, the captors are in possession of evidence that would shew the goods to have come in such a course, in an anterior stage of the transaction, as would make them subject to confiscation ; I have already said, that the Court is not inclined to go out of the limits of the present transaction, unless on some suggestion arising out of the original evidence : It has not been pointed out that there is any such foundation laid in this cause ; all the papers and the depositions stop at *Emden* ; and I do not perceive that there is any thing that leads to a further inquiry. What would be the effect of the letter, if it was produced, I cannot say ; but supposing it to be proved, that the agent in *London* was in the general habit of procuring such articles from the enemy, I think there would be a defect of evidence to apply it to the present case. The circumstance of the intercepting of these letters would, on the contrary, afford some ground of indifference on the part of the claimant, that this cargo did not arise out of such a course of trade.

It has been argued, that if the matter was, as it is suggested, it would be hard to affect the actual proprietors of this cargo with confiscation ; inasmuch as they knew nothing of the course in which their orders had been executed—How far they might be deemed answerable for the transaction of their agent, is a matter on which the Court need not to give any opinion

till the question comes necessarily before it. In the present case, supposing that they would be penally affected as to their property, in the articles so procured, I am of opinion that the evidence is not offered upon such grounds as can entitle it to admission.

Cargo restored.

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On the part of the captors, the King's Advocate—
prayed, that they might be allowed their expenses.

Court—If English merchants resort to the expedient of protecting their trade by these false papers, it leads captors into expenses, for which these captors ought not to be answerable.

Captors expenses granted.

THE COSMOPOLITE, MATHIESON Master.

THIS was a case of an *American* ship, captured by the *French*, carried into *Spain*, there condemned by the *French* consul in a *Spanish* port, sold under that sentence, and afterwards transferred to the present master, a *Danish* subject, who was the original claimant in this cause. A claim was likewise interposed on the part of the former *American* proprietor, on a suggestion, that though *France* had been in some state of hostilities with *America*, *Spain* had not; that *Spain* was in respect to *America*, a neutral port; and that a condemnation of *American* ships in a *Spanish* port was illegal, and the transfer under it invalid.

JUDGMENT.

Sir W. Scott—This is a question rather on the illegality than the fact of the transfer, which is asserted

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An American
ship, captured
by the French,
condemned in
Spain, and pur-
chased by a Da-
nish merchant—
On a subsequent
capture by an
English cruiser,
a claim was
given for the
Danish purcha-
ser—and also for
the former Amer-
ican proprietor,
on the ground,
that the condem-
nation, having
been in a port
neutral towards
America, was in-
valid—The court
declined to judge
of the relation of
foreign states—
Restitution to the
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chaser.

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to have taken place. The vessel appears to have been an *American* ship, seized by the *French* and carried into the island of *Teneriffe*; where she was condemned under the authority of the *French* consul, and transferred, subsequently to the present *Danish* possessor.

The objection that has been taken is, that as this was an *American* ship, and as *Spain* and *America* were in their political relations, perfectly neutral, it must be considered as a condemnation in a neutral port, and subject to the same rule as the Court laid down in the *Fladoyen*, with respect to the condemnation of *British* ships by the *French* consul in *Norway*. It is argued that the Court is therefore under the same obligations to restore this vessel to the original *American* proprietor: But that consequence will not, I think, necessarily follow; because, although this Court has interposed to entertain suits on the part of *American* subjects, in giving the same assistance to *American* salvors (*Two Friends*, 1 Adm. Rep. p. 271.) as to *British* subjects, and in restoring *American* property, retaken from the *French* by our cruisers; yet it has been only in cases of *recapture* during the same voyage where there had been no condemnation at all. There has been no case, that I recollect, in which this Court has proceeded to examine the legality of a condemnation passed on an *American* ship in consequence of capture by the *French*. It does so, it is true, with respect to captures made from this country by *France*: But the same rule of conduct does not apply to other countries, whose relations with *France* this Court cannot so well know, nor so exactly estimate.—The relative state of *America* and

France has been so equivocal, that it would be difficult for this Court to say distinctly, whether it was a state of war or not—or whether it has been a state of peace, with many of the incidents of war attending it: Of the exact rights and duties arising from such an uncertain state, it is not easy for this Court to determine; neither is the Court called upon by any duty to pass any judgment upon them. This Court is perfectly acquainted with the relations subsisting between our own country and *Denmark*. It can judge of the state of treaties* and amity, under which the general principle has acquired additional strength, and by which the use of their respective ports is expressly prohibited to be granted to the cruizers of the enemy of the other party for the purposes of war: But can I pronounce with equal certainty in what manner *Spain* may lend out her ports to *French* captors, relatively to *Americans*? or what understanding there may be on this subject between *America* and *Spain*? Under these considerations, I do not find myself authorized to say, that this condemnation stands exactly on the same footing as the *French* condemnations of *British* property in *Norway*. The purchase appears to have been made fairly for a valuable consideration from the *French* possession. It does not appear to me that this Court is competent to examine and enforce the claim of the *American* owner, the justice of which depends upon political transactions and relations, with which this Court is not judicially acquainted.

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* A.D. 1489.
1523. 1661.

Restitution to the *Danish* claimant.

**THE TWEE GEBROEDERS, NORTHOLT
Master.**

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1801.*

Territorial claim
to protect cap-
ture, on the part
of Prussia, held
not to be es-
tablished—Vessel
condemned.

THIS was a case of considerable importance, as it respected the claim of a sovereign state for a right of territory over the spot where the capture in question was alleged to have taken place. The case arose on the capture of vessels in the *Groningen Watt*, on a suggestion that they were bound from *Hamburg* to *Amsterdam*, then under blockade; and a claim was given under the authority of the *Prussian* minister, averring the place in question to be within the territories of the king of *Prussia*.*

JUDGMENT.

Sir *W. Scott*—This is the case of a ship and goods proceeded against for a breach of the blockade of *Amsterdam*; they are claimed as being taken on neutral territory; but it is denied on the part of the captors that they were *so* taken.

On the blockade of *Amsterdam* this Court has been inclined to hold generally, that all sea passages to *Amsterdam* by that great body of waters, the *Zuyder*

* The claim of the *Prussian* consul described the captured vessels to have been lying at anchor upon the *Outhousen Watt*, near *Eems* close to the third beacon; and the capture to have been made 14th, *July*, 1799, by a boat from the *L'Espiegle*, then lying in the *Wester Balg*, and also on the river *Eems*, and within the territories and dominions of his *Prussian* majesty.—The affidavit of the captors gave a different account of the situation of the capturing vessel, see Appendix.

Zee, were blockaded, supposing those sea passages to be in possession of the enemy: Such as were in the possession of neutrals, It was of opinion, were not included, unless the blockading force could be applied at the interior extremity of their communication. Whether the present capture in question was made in a sea passage to the *Zuyder Zee*, belonging to the enemy or to a neutral power, will be decided by the considerations which are to be examined in the further pursuit of this question. 2dly, Supposing that question determined against the immunity of the place of capture, another question is proposed, whether, the belligerent party having passed over neutral territory, *animo capiendi*, to the place where his rights have been exercised, those rights of capture so exercised are not thereby invalidated?

The capture is represented on both sides to have been made in the *Watt*, which runs along the coast of *Groningen*, by two or three of his Majesty's ships that went up the *Eems*. It is not, I think, contended, that the capturing ships were stationed on the neutral territory, unless the whole of the *Watt* passage is to be so considered. The precise place where the capturing ships lay, is not very distinctly marked; but the balance of evidence inclines to establish, that they were on the other side a line of buoys, which Captain *M'Kenzie* swears were considered as being on *Dutch* territory, and that he placed his ship as near as possible in the place where some *Dutch* armed vessels (which were driven away on his approach) were stationed. On the whole that is to be collected from the evidence, as to the exact spot, I am led to suppose, that the ships were not stationed

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on neutral territory, unless the whole of the *Watt* passage is to be so considered.

It is scarcely necessary to observe, that a claim of territory is of a most sacred nature—In ordinary cases where the place of capture is admitted, it proves itself; the facts happen within acknowledged and notorious limits; no enquiry is either required or permitted. But otherwise, when it happens in places which the neutral country does not possess by any general principle or by any acknowledged right; in such a case, it being contended by those who represent the belligerent state, that no right exists, and that therefore the capture is free and legal, it can never be deemed an act of disrespect on the part of the foreign tribunal, if it proceeds to inquire into the fact of territorial rights—certainly not with a view of deciding generally upon such rights, but merely with respect to this particular fact of capture—not for the purpose of shaking or invalidating such rights, but that it may enforce a legal observance of them, if the facts, on which they depend, are competently established.

Something has been said in argument of the reverence due to the assertion of princes, whose claim is advanced; and this Court is disposed to pay the fullest measures of reverence which the law will allow. It is not improper to remark, that it is a question discussed much at length by foreign writers, on general law, in what cases the sole assertion of princes is to be taken as conclusive legal proof; and no principle is more universally established among them, than that the mere assertion is not to be received *as full and complete proof*, or as *Farrinacius* expresses it, “*assertioni principis non statur quando agitur de causa pro-*

*principis, vel de ejus commodo aut interesse;**"* and indeed a contrary rule would carry the reverence due to these august personages, to an extravagance that derided all reason and justice.

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Strictly speaking, the nature of the claim brought forward on this occasion, is against the general inclination of the law; for it is a claim of private and exclusive property, on a subject where a general, or at least a common use is to be presumed. It is a claim which can only arise on portions of the sea, or on rivers flowing through different states: The law of rivers flowing entirely through the provinces of one state is perfectly clear. In the sea, out of the reach of cannon shot, universal use is presumed: In rivers flowing through conterminous states, a common use to the different states is presumed. Yet, in both of these, there may, by legal possibility, exist a peculiar property, excluding the universal or the common use. Portions of the sea are prescribed for; so are rivers flowing through contiguous states: the banks on one side may have been first settled, by which the possession and property may have been acquired, or cessions may have taken place upon conquests, or other events. But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence.

* Tunc enim illius assertioni minime standum esse scriperunt Gabr. &c. et Aym. ubi exemplificat in principe asserente castrum ad se pertinere. L. 2. tit. 6. Quest. 63. n. 173.

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ocean to be deemed mere river. In common understanding, the *embouchure* or mouth of a river is that spot, where the river enters the open space to which the sea flows, and where the points of the coast project no further. There may be shoals and sands beyond ; as on the coasts of this kingdom, the *Godwin sands* ; and buoys may be placed, and they may be distinguished from the sea at low water ; but what are these when the tide flows up, or at half tide, one way or the other ?—undistinguishably parts of the ocean—*undique pontus*. I will not venture to lay down any thing more positively on this matter, than that the nature of such sea passages must be held to be *divisi imperii*, between the ocean and the main land ; and when the sea flows for navigation, they should rather seem to belong to the former, than the latter.

It is the less necessary to be precise on this point, because the capture in question did not happen in these streams, the eastern or western *Eems*, but in the *Watt* ; and supposing that these two passages were at all times *rivers*, and mere rivers, how does it follow that all the water, with which they communicate, are not only river, but parts of those rivers ? They seem certainly not to be so considered by the neighbouring states. Do they carry with them the name of *Eems* ? by no means. They have a denomination of their own. In the chart which has been exhibited, and is referred to on both sides, though not introduced by authority, how is the bank of land described ? The *new Zee dyke* not the *river dyke*, which it ought to be, if the portion of waters was considered as river and not sea ;—How is the portion of waters at the other end of it denominated ? The

Lower Zee. What do the witnesses say? It is stated in one affidavit, that *Groningen* extends as far as a man standing on the *coast* can throw a horse-shoe: So the other witness uses the same expression, *standing on the coast*, a word very strangely applied to a river, but the proper word applied to the sea. Where is the horse-shoe to be thrown? into the *sea*, not into the *river*, as they all express themselves.

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Conformable to this representation, are the terms in which the extreme shore is described, *buyten land, the without or outmost land*; that point which has no headland beyond it. I observe too, that at particular times of the tide, the *Watt* passage is totally dry.—The *British* captors walked over the sand to take possession of the ships, which were at this time lying on land, but they were compelled to retire by the reflux of the sea. It is then at high water to be taken as part of the sea, but at low water as part of the land—But of what land? of the land to which it is connected physically, the land of *Groningen*. It would be strange indeed, that the jurisdiction of another country, separated by water, should extend beyond that water, over a space connected with the main land, and at times making an actual part of it.

But leaving this out of the case, on what grounds is the *Watt* to be considered as part of the *Eems*, which runs at one end of it, *at some states* of the sides; rather than as part of the sea, which *at all times* runs at the other end? Admitting that the two passages were at all times to be deemed the river *Eems*, how follows it, that all sea passages, communicating with it, are to be deemed, not only river, but parts of that river? On the mere principal cir-

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Cumstances, it is not too much to say, that the claim is against all special, as well as all general presumption: upon all visible circumstances, it must be taken not as part of *East Friesland*, but either as part of the general sea, or of the land of *Groningen*.

Does the history support the claim better than the geography? History supplies no proof of original occupancy or subsequent cession: As far as remote historical tradition goes, it seems to appropriate it to *Groningen*, and to speak of it as a part or parcel of that land, from which it has been since withdrawn by the irruption of the sea. But there is evidence of an historical nature offered, of two kiuds; 1st, There is an asserted grant of the emperor, as a common sovereign, in 1454; and, 2dly, The exercise of dominion. On the grant, two things are to be ascertained; 1st, the authority; and, 2dly; the effect. It would ill become this Court to question the extent of Imperial rights; but it is not too much to say, that the carving out a common river, even in the interior of *Germany*, into private and exclusive possession, is a very high act of prerogative; and it is not shewn, by any *German* jurist of authority, that the relation which the Emperor, as head of that feudal confederacy bears to its members, and which has been very different at different periods, did at any time, or particularly at the time in question, invest him with any such prerogative. Suppose this case, that an Imperial grant did in most express terms declare, that one of the maritime provinces of the empire should not have its natural extent of sea jurisdiction, but that another province should possess it, and should confine and beard up its neighbour to the

narrow extent within which a man can throw a horse-shoe or ploughshare from the shore! No one can say that a foreign court might not, without any immodesty or irreverence, desire some information respecting the constitutional validity of such a grant—a grant which opposes all common principle, and which, coming from the general protector of the empire, deprives one province of its natural amplitude and means of defence, and exposes it to constant uneasiness and irritation from another province; and all this without any assigned reason—a grant which represents the whole *German Empire* (a free constitution as it fundamentally is), subject to as capricious a state of dependance on its chief, as can possibly be described.

But, 2dly. No such injustice is imputable to the grant; for construing it, as I am compelled to do for the present purpose, I can attribute it to no such intended effect. What is it? It is truly described by the *Prussian Minister, Baron Jacobi*, “*as conferring, on Count Ulric the feudal investiture of East Friesland.*” It grants *East Friesland* in its full integrity and no more; it enlarges no rights; it abridges no rights of another province; it grants nothing to the territory; it is a mere personal grant of that territory to the individual and his heirs. This is the general purview of the grant. What does it convey? *from the Western Eems*—not inclusively: Without any reference to established usage the terms could hardly be understood to enure to a grant of the *Western Eems* itself; because it is not the natural construction of the words, and secondly, because it interferes with the natural right of the conterminous province; for

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nobody denies that *Rottum* belongs to *Groningen*, and that *Borcum* is the last *Prussian* island. It gives the river *Eems* and all other “streams, rivers, and rivulets,” as if dispository of river navigations; but whether it be so or not, it is expressly qualified by the “reserve of rights appertaining to *East Friesland*;” so that it leaves every thing on the footing of pre-existing rights, adding or diminishing nothing. This seems to be admitted by the persons authorizing the claim, and alledging this grant in support of it; for it is said on their part, that the grant is to receive its construction from the later usage, which usage is to be taken as evidence of the pre-existing right.

That being the case, there being no evidence of acquisition, no proof of cession, and no direct authority to be derived from the terms of the grant, the whole question is again reduced to usage. If that is proved, it is certainly evidence of the most favoured kind: All men have a common interest in maintaining the sanctity of ancient possession, however acquired; ancient land-marks and ancient sea-marks are *res sacrae*, and whoever moves them *piaculum esto*. Then what is the natural evidence to be expected of ancient and constant usage? and how much of this has been produced? How is ancient jurisdiction proved on such a subject? By formal acts of authority, by holding courts of conservancy of the navigation, by ceremonious processions to ascertain the boundaries in the nature of perambulations, by marked distinctions in maps and charts prepared under public inspection and controul, by levying of tolls, by exclusive fisheries, by permanent and visible emblems of power there established, by the appoint-

ment of officers specially designated to that station, by stationary guardships, by records and muniments, shewing that the right has always been asserted, and whenever resisted, asserted with effect. This is the natural evidence to be looked for generally; and such as it is more particularly reasonable to require, where a right is claimed against all general principles, and also against the natural rights and limits, and, indeed, against the independance and security of neighbouring states.

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How much of this evidence is produced? A map or chart is produced, not published by authority, but adopted by authority; in which there is no distinction whatever made, that applies to the support of this claim. Upon that map, a person is examined at *Embden*, who puts a mark or distinction of his own* as the limits of what he conceives to be the extremity of the *Prussian* territory. He proceeds to mention what is the only important fact in the case, on that side of the question; "that thirty-seven years ago' he was employed in fixing buoys and beacons, and that whenever he or his fellows fixed them beyond that point, the *Dutch* took them up and threw them away, considering them as signs of authority and jurisdiction:" This cannot undoubtedly be considered as of little or no weight? but that it should be conclusive, cannot be maintained: One observation immediately arises on it, that if this man and his fellows did fix these buoys beyond these limits, *they* at that time either did not perfectly comprehend the meaning of

* See Appendix.

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the buoys, or the exact limits of the territory ; because, if they considered them as indications of territory, how came they to place them beyond what are now assigned as the just limits, if these were recognized limits ? This witness is confirmed by three other persons, ship masters of *Embden* and *Papenberg*, with respect to their belief and understanding of the matter ; but without referring to any particular fact as the ground of their opinion : They only say, " that they understand the buoys and beacons at each extremity were marks of sovereignty ; but no beacons whatever appear to be marked in this chart as in the *Watt* passage : And how is it possible that the Court can hold the buoys and beacons to be marks of sovereignty, when it appears that the city of *Embden* maintains establishments of that kind in the island of *Rottum*, which is admitted to be a *Datch* island belonging to *Groningen* ? Indeed the laying down buoys and beacons is not in its nature to be considered as a necessary indication of territory, nor is it so understood by foreign writers.* : The laying them down may be a *servitus*, and a burthen, or it may be neither ; it may be only, that this is a navigation in which the city of *Embden* is much interested, and the *Dutch* comparatively little, and therefore are content to leave the care and expense

* Iste autem modus vasa in fiumine prominentia habendi, quod in transcurso notandum, non semper arguit dominium in mari aut flumine publico ; cum etiam ab illis qui dominium tale non vendicant, usurpari soleat in securitatem navigationis, et libertatem commerciorum, illis in tali loco concessam. *Loccenius de Jure Maritimo.* L. 2. ch. 1.

of it upon their neighbours. The claim relies on these, *as proofs of sovereignty*; perhaps the evidence is rather to shew it to be more directly a corporation right of the city of *Embden*; which of course would belong to the Count of *East Friesland*, the sovereign of that City. I do not mean to lay stress on this observation any farther, than that if it is in any degree of that nature, it may somewhat enervate the evidence of the persons connected with that place; since the practice of the civil and imperial law holds principles very similar to those of our own municipal law, on the credit of testimony in such cases; and on this particular question, the exceptions stated by *Farinacius* might not unfairly be objected against the *Embden* witness (if it were necessary to urge them), in a matter which concerned the right and jurisdiction of his own city—“*Limita, ut nec testes de universitate, ad favorem universitatis admittantur, quando esset magna affectio ob annexum commodum, utputa quia age-retur de magno honore, vel de aliqua jurisdictione, aut etiam pro statu ipsius universitatis*”—and again, *Si testis de universitate admittatur ad testificandum pro sua universitate, non est omni exceptione major, nec integræ fidei.*” L. 2. t. 6. Qu. 60. n. 522—536.

Then with respect to the custom on which the claim is to be sustained, what is the evidence that is required of it? It is laid down by *Gail*, an Imperial writer of credit on this subject,* and by many

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* Those who have any curiosity to inquire into the rules of practice of the Imperial law, and the reasonings of the civil law writers on this subject, will find them treated of by *Gail*, lib. 2. ch. 31. *De Consuetudine & Requisitis.* Some of his positions are:

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other writers of the best authority, that there must be at least two witnesses to prove a custom ; and that they must assign acts done as the ground of their belief : It is indeed doubted by them whether mere extra-judicial acts do afford sufficient evidence ; they incline to think, however, that they do ; but the whole course of their reasoning, on the nature of the evidence to be admitted, is very similar to our own municipal rules on this subject, which indeed seem derived from the same sources.

As to all other evidence in this case, except the testimony of one person, speaking to the fact of his being employed to lay down buoys, and of having had a scuffle with some *Dutch* persons, as to the position of them ; and excepting the depositions

“ Quod ad frequentiam actuum, communis est opinio duos actus cum lapsu temporis sufficere ad introducendam consuetudinem, hoc tamen moderamine, ut procedat, quando boni illi actus ita sunt notori, ut verisimiliter in populi notitiam veniant ; alias actus duo non sufficerent, sed tot requiruntur ut ex iis tacitus populi consensus colligi possit. Sed quid de actibus extrajudicialibus ? Brevis, communis opinio tenet non solum actus judiciales sed etiam extrajudiciales sufficere, dummodo tales sint actus ut ex iis de ticto populi consensu constare possit. — Modo ad primum venianus, Qui super consuetudine intentionem suam fundat, is eam probare debet, quia consuetudo facta est, et facta non presumuntur nisi probentur, et probare eam debet cum suis requisitis, alias succumbet. — Proinde testes ad probandam consuetudinem producti, de hujusmodi requisitis cum ratione scientiae deponere debent ; quia non sufficit talem extare consuetudinem, sed necesse est dare rationem scientiae, utputa quia viderunt ita observari in similibus casibus et actibus, idque frequenter, et longo tempore, publice, praesentibus et scientibus multis personis, adeo quod inde apparent intercessisse consensum populi. Præterea testes in tempore et actuū identitate conveniri debent ; alias si de diversis actibus deponerent, tanquam singulares, fidem non facerent.”

of two others speaking *to their belief only*, without assigning any reason of fact, there is a total silence : there are no tolls but for the *Borcum* light-house ; no water bailiff, nor court, rolls of any water jurisdiction, nothing in the nature of perambulations, no stationary officers or guard-ships. But on the contrary, there is a most material fact arising, that the *Dutch* not only had guard-ships in the *Groningen Watt*, but that they exercised actual hostilities there; certainly this exercise of hostility is not conclusive evidence, that the place where this happened was not *Prussian* territory ; because it might be an irregularity on the part of the *Dutch*, and a subject of complaint on the part of *Prussia*; but as far as it appears on this evidence, it stands a naked fact ; it does not appear to have been complained of, as an irregularity or encroachment on the *Prussian* territory ; and therefore it is not to be presumed by this Court, that it is so to be considered.

On this evidence then, it is impossible for me to pronounce, that these captures are invalidated by being actually made on *Prussian* territory :—There remains the other question, whether they are not viated, by the capturing ship having passed over neutral territory, to accomplish the capture ? as it is alleged they passed up the *Western Eems*, and that the whole of that is *Prussian* territory. I have already intimated some doubts that might possibly be entertained upon the present evidence, whether the *Western Eems* is to be deemed at all times and in all parts of it clearly *Prussian* territory ; but supposing it to be so, is it a violation of territory, to have committed an act of capture after having passed over this territory to effect it ? On this point

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there are some observations of law, and some of fact, that appear not unworthy of notice: In the first place, the place of capture is accessible by other passages, not asserted to be neutral; it is not alleged that a hostile force might not have reached these ships by another route, through the *Lower Zee*, or other communications: It is not to be said that they were so inclosed and protected on all sides by neutral territory, that you could not approach them without passing over it. In the next place, it is not the case of an internal passage into the heart of the country, into the *Homegat*, if I may adopt their own term; it is a passage over an external portion of water, which you may prescribe for as territory, but not as inland river, or as part of the internal territory; it is not an entrance of an armed force, up an inward passage, to reach an enemy lying in the interior of the land.— Thirdly, It is an observation of law, that the passage of ships over territorial portions of the sea, or external water, is a thing less guarded, than the passage of armies over land, and for obvious reasons: An army in the strictest state of discipline, can hardly pass into a country without great inconvenience to the inhabitants; roads are broken up; the price of provisions is raised; the sick are quartered on individuals, and a general uneasiness and terror is excited; but the passage of two or three vessels, or of a fleet over external waters, may be neither felt nor perceived. For this reason, the act of inoffensively passing over such portions of water, without any violence committed there, is not considered as any violation of territory belonging to a neutral state—permission is not usually required; such waters are considered as the common thoroughfare of nations, though they may be so far territory, as

that any actual exercise of hostility is prohibited therein. Fourthly; It is to be observed, that the right of refusal of passage, even upon land, is supposed to depend more on the inconvenience falling on the neutral state, than on any injustice committed to the third party, who is to be affected by the permission. *Grotius* and *Vattel* both agree,* that it is no ground of complaint, nor cause of war against the intermediate neutral state, if it grants passage to the troops of a belligerent, though inconvenience may ensue to the state beyond; the ground of the right of refusal being the inconvenience that such passages bring with them to the neutral state itself. This being the general state of the fact and of the law; it would be a proposition which could not be maintained in a full universal extent, that the passing over water, claimed as neutral territory, would vitiate any ulterior capture made on a third party. Suppose the case of a war between *England* and *Russia*, and that the *Sound* was the pass in question, over which *Denmark* claims and exercises imperial rights, on stronger grounds than can

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* On est aussi tenu de laisser passer librement par les terres les fleuves, et les endroits de la mer, qui peuvent nous appartenir, ceux qui veulent aller ailleurs, pour de justes causes; ou s'ils vont trafiquer avec un peuple éloigné, ou s'il ont enterpris une guerre juste—*Grot.* l. 2. c. 2. s. 13.

A toutes les nations ce devoir s'étend, aux troupes comme aux particuliers. Mais c'est au maître du territoire de juger, si le passage est innocent—et il est très-difficile que celui d'une armée le soit entièrement—le seul danger qu'il y a à recevoir chez soi une armée puissante, peut autoriser à lui refuser l'entrée du pays—*Vatt.* l. 3. c. 7. s. 119. 123. *Grotius* does not allow the right of refusal on this ground, but points out the precautions to which the intermediate state may resort,—“en faisant passer les troupes, par petites bandes séparées, ou sans armes, ou lui demander ôtages.”

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be maintained in support of this claim; or suppose a war between *France* and *Russia*, and the *Dardanelles* to be the pass in question; or suppose any two powers exercising hostilities in the *Mediterranean*, after having passed through the Straights of *Gibraltar*, occupied by an *English* fortress on one side, and by *Tangier* on the other, formerly in possession of this country; could it be said in any of these cases, that captures made beyond this point of passage over neutral water territory, would be invalidated on any principle of the law of nations? Where a free passage is generally enjoyed, notwithstanding a claim of territory may exist for certain purposes, no violation of territory is committed; if the party, after an inoffensive passage, conducted in the usual manner, begins an act of hostility in open ground. In order to have an invalidating effect, it must at least be either an *unpermitted* passage, over territory where permission is regularly requested; or a passage under a permission obtained on false representation, and suggestions of the purpose designed. In either of these cases there might be an original misfeasance, and trespass, that travelled throughout and contaminated the whole; but if nothing of this sort can be objected, I am of opinion, that a capture, otherwise legal, is in no degree affected by a passage over territory, in itself otherwise legal and permitted.

Having before said that this act of capture was not exercised on neutral territory, as far as I am enabled to judge by the present evidence, I must pronounce that no sufficient objections are shewn against the validity of these captures; and that the ships must be adjudged lawful prize to the captors, being bound to *Amsterdam* in breach of the blockade.

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(Instance Court.)

THIS was a case of salvage, civil and maritime, originating by actions entered on behalf of several salvors, against the ship, cargo, and freight, stated altogether in the attestation of the owner, and schedule annexed, to be of the value of £17,604.

Salvage, civil
and maritime—
Distress great—
Value saved
17,604*l.* salvage
given, about
1,300*l.* Salvors
numerous.

JUDGMENT.

Sir *W. Scott*—This was a case of salvage on account of service performed in saving a ship and cargo of considerable value in great distress.*

The principles on which the Court of Admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look not merely to the exact *quantum* of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exer-

* The ship belonging to Mr. *Wildman* of *London*, being of the burthen of 404 tons, and carrying a cargo of *West India* produce from *Jamaica* to *London* struck on the *Pan sand* about 5 o'clock a.m. on the 5th of *October*; every attempt was made by the crew, and a pilot taken on board on the 5th, in the *Downs*, to get her off, but without effect; on the 7th, Mr. *Rowe* and Mr. *Valder*, being two custom-house officers, and persons sent by Mr. *Cobb*, the agent and correspondent of Mr. *Wildman*, came on board. By their advice, a considerable quantity of rum and sugar, and the guns, &c. were taken out for the purpose of lightening the ship; but it was not till after many *effactual* efforts made during the 8th, to float her, that she at last got off in the evening of the 8th, and sailed on the morning of the 9th, to a place of safety, &c.

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tions of this nature. The fatigue, the anxiety, the determination to encounter danger, if necessary, the spirit of adventure, the skill and dexterity which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of salvors most, is the actual danger which they have incurred; the value of human life is that which is, and ought to be, principally considered in the preservation of other men's property and if this is shewn to have been hazarded, it is most highly estimated. I cannot say, that peril of life, in the present case, appears to have been incurred in the degree which has been represented by the 'salvor's counsel: The weather was not unfavourable in any very menacing manner, so as, to render their condition particularly perilous; but the situation of the ship and cargo was extremely so. It is proved that such was their alarm concerning the possibility of saving her, after the ship got upon the sand, that a proposal was made to the master, by the master of a ship, and appears to have been aquiesced in by him, for the throwing of this valuable cargo overboard; it was resisted by the salvors, they used their efforts, they employed their skill, and ship and cargo are finally preserved. The ship and cargo are of great value; estimated at no less than £17,604 and every sixpence of this value is indebted for its safety to these persons.—They are numerous, and their exertions were continued through the course of a third day. It seems hardly necessary for the Court to look into the affidavits, by which the several salvors attempt to distinguish each others merits, by shades of difference hardly worthy of notice. The whole is meritoriously performed, and I pronounce £1,000 to

be due to the salvors ; and the farther sum of £50 to the owners of the three boats and smacks ; 10 guineas a-piece to the two boys, and 15 guineas a-piece to the masters of the several boats employed in saving the ship and cargo.

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(ON Appeal, the 24th Nov. 1801),

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This cause was heard before the Judges Delegates at Serjeant's Inn, on an appeal brought by Mr. Wildman, the owner of the ship and cargo.

On the part of the salvors, it was argued by the King's Advocate, Erskine, Laurence, and Swabey— That the ancient principle of the maritime law gave a very liberal reward in cases of salvage, where real services had been performed, and considerable benefit had been derived to the property ; that the reward had anciently been a proportion of the thing saved—a moiety, a fifth or a tenth, according to the merits of the case ; but that less than a tenth was seldom given ; that, although the rule of giving an aliquot proportion was now departed from, as not so well adapted to the extended state of modern commerce, the principle of liberal encouragement still remains : It was stated also from the practice of the Courts of Common Law, that in the case of the *Ooster Eems*, lost on the *Godwin* sands, 21st January, 1783, (in which a demand of salvage, for the preservation of the cargo, had been sent to a jury, on objections taken to the report of the remembrancer of the Exchequer, who had awarded £800), a verdict was returned,

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under the direction of Lord *Loughborough*, allotting as much as £3,500—the value of the whole property being under £30,000.

On the other side, Arnold, Adams, and Marryatt—admitting the general principle under which salvage was to be rewarded, contending that the services of the present salvors were not of a high nature*; that

* In cases of salvage, the great difficulty is, to obtain a representation of the facts from disinterested witnesses; as there is usually a great deal of contradictory evidence. The following deposition is printed shortly, as containing a statement of the circumstances of the present case, given by persons who had no apparent personal interest whatever, and who were first sent to superintend the management of the vessel by the agent of the owner.

24th April, 1800.

"Appeared personally *Isaac Rowe*, of *Margate*, in the county of *Kent*, gentleman, and *Daniel Valder* of the same place, officer of the customs, and made oath, that the request of Messrs. *Cobbs*, of *Margate*, aforesaid, bankers and agents, stating that the ship *William Beckford*, *Robert Muirhead* master, proceeded against in this cause, was on shore, and in great danger and distress, on a sand called the *Pan Sand*, distance about ten miles from *Margate*; they, these appearers, went from *Margate* on *Sunday* evening, and early in the morning of *Monday*, the 7th day of *October* last past, got on board the said ship, and found her, in their opinion (who were well versed in such matters, he, the appearer, *Isaac Rowe*, having lived at *Margate*, and been for many years concerned as agent for shipping; and the appearer, *Daniel Valder*, having been at sea for 14 or 15 years), in a very dangerous situation, with her keel to starboard; that they found the boat *Hawk*, *Edward Gibbs* master, and smack *Henry and Catherine*, *John Nelson* master, and their crews, attendant upon and employed in her assistance, and understood that they had made every exertion the preceding tide to get her off without effect, and then, she making water, and straining much, they had tended the pumps, and done what-

they were services of mere labour, for which a reward, bearing some proportion to a labour price, would be a just and adequate compensation; that they had contributed no nautical skill, and had incurred no personal danger. In opposition to the case

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ever was necessary, the ship being of the burthen of four or five hundred tons, with a very valuable cargo of *West India* produce, and the captains, officers, and crew, very few in number, weak and exhausted, and incapable to get the ship off without assistance; that they, these appearers, were clearly of opinion that the vessel could not be got off without lightening her, and accordingly advised that it would be proper to cut away the main mast, but it was resolved to try what the coming tide would do; but their efforts then, in loosing the sails, and heaving upon the cable, proving ineffectual, they resolved to lighten the ship as fast as possible, which they accordingly began to do, and whilst they were so doing, the captain of the *Brunswick*, a friend of the said captain came on board the said ship *William Beckford*, and so fully concurred in the necessity of that measure, that he advised him to throw the cargo overboard; and which they verily believe he would have done, but for the advice and remonstrances of the appearers and the boats crews aforesaid; but the said *Robert Muirhead* was so apprehensive of the danger the said ship was in, that by the advice of his said friend he sent all his own property, consisting of wearing apparel and other effects, on board the *Brunswick* for safety; that they accordingly continued to lighten the ship until about four o'clock in the afternoon, and, during that period, got out a large quantity of rum, sugars, coffee, and logwood, which goods were put into several boats, and carried on shore, and safely warehoused at *Margate*.

Then stating Mr. *Wildman's* presence on board the ship on the 8th, and the means taken of backing the sails, on the suggestion of the salvors, by which the ship was at length got off, &c.

The deponents finally made oath "that the said boatmen from *Margate*, through the whole business, used every effort in their power for the preservation of the ship and cargo; and they verily believe, that had it not been for their exertions and skill, the whole would have been lost."

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of the *Ooster Eems*, Mr. Marryatt cited the case of the *True Briton, Clarke*; which was a valuable home-ward-bound *East India* ship, stranded for about 24 hours on the *Goodwin* sands, 19th *March*, 1798, but floating again the next tide, by the aid of some boatmen, carrying out an anchor, and assisting with their advice, &c. In that case, the demand against the ship and freight was laid at £3000, but 100 guineas were tendered and paid into Court; and the matter being sent to a jury at *Maidstone*, a verdict was returned, giving not more than £200.*

JUDGMENT.

The sentence of the Court of Delegates affirmed the sentence of the Court of Admiralty, but without costs of the appeal.

* *N. B.*—There was a separate action against the *East India* Company, on account of the cargo, in which the salvors were nonsuited.

A P P E N D I X.

A

(Note to Page 140.)

THE practice to which the Court alludes, is that general and indiscriminate exchange of prisoners, rank for rank, and afterwards, at an established price, which has prevailed in modern times, on the account of belligerent nations, during the heat of war, with as perfect candor and good faith, and with as humane attention to the unfortunate objects of this agreement, as could mark a contract of profound peace, or a deed of ordinary charity between fellow-citizens. Out of this description indeed, must be excepted, many of the proceedings of the ruling powers of *France*, during the present war: But adverting to the practice of the old government of *France*, and of the other nations of *Europe*, it is impossible not to feel, that it is a proceeding so honourable to the meliorated condition of modern manners, that we naturally wish to assign it to the particular age, that had the merit of producing so salutary a change in the laws of war. But, perhaps, in such an inquiry, it will not be easy to accomplish more, than to describe the general features of different periods, so as to bring us something nearer to a conjecture, as to *when*, or *about what time*, the change is likely to have been introduced.

The consequences of captivity, among the *Romans*, were death or perpetual slavery. Whilst they treated their enemies with this severity, they did not suffer themselves to relent from any compunctions of tenderness towards their own soldiers (a); sacrificing (a) *Livy*, B. 22. in this instance the feelings of humanity to a boastful magnanimity; and deeming it a measure of policy, to discourage their army, from trusting to any farther protection, than their own valour. Their soldiers might escape, or redeem themselves, and be entitled to be received again into the State, *jure postliminii*; but all public solicitude for their return, on the part of the Commonwealth, was haughtily disdained.

*Hoc caverat mens provida Reguli
Dissentientis conditionibus
Fædis, et exemplo trahenti,
Perniciem veniens in æcum,
Si non periret immiserabilis
Captiona pubes.*

Hor. Lib. 3.

This

A P P E N D I X, A.

This well known circumstance in the history of *Regulus*, and the purpose of his mission, which was to propose an exchange of prisoners, between the states of *Rome* and *Carthage*, during a subsisting war, teaches us, that the practice of modern times is to be considered as novel—not in respect to the original conception of the measure—but only in respect to the regular and systematic influence which it has obtained, and the happy consequences derived from it. The principle was not long in suggesting itself to the notice of mankind; but among the ancients, it was counteracted by other causes, and in no slight degree, by the proud and crafty spirit of military aggrandizement, which forms so conspicuous a feature in the *Roman* character.

In the same manner, in the history of modern times, it may, perhaps, be found, that the principle was rather obstructed and retarded in its growth by collateral obstacles, than utterly unknown, to our ancestors, as not within the scope of their comprehension. *Grotius*, following *Boerius* and others cited in his note, *A. 3. c. 7.* ascribes the civilization of the laws of war, in substituting ransom and exchange of prisoners, in the place of death and slavery, to the influence of Christianity. But this must be received with great latitude. The reasoning by which the spirit of Christianity was applied to temper the severity of war, appears to have been very loosely constructed, and very limited in its operation. The following passage in *Bellus* seems to contain the just amount of it. “*Lex, enim, (si quis ingenuam, § f. ff. de Capt.) dicit, quod in civilibus dissentionibus, qui est alterutrius partis, non est hostis loco, ideoque neque captivus efficitur, neque postliminio egit—non sunt enim minus Christiani quam Romani, invicem et concives et fratres, quod comprobatur auctoritate sacrarum literarum.* Cum enim Israelitæ captivorum magnum numerum traherent de Hierusalem, oceurrit eis propheta valde increpans captitatem illam, jussitque omnes dimitti, quia magnus (ut dixit) furor Domini eis imminebat: Ut sunt igitur fratres, et non hostes, etiam si dissident, non efficiuntur servi capientium.” *Bellus, pt. 4. tit. 1.* The most favoured condition of prisoners, however, among Christian States appears in the time of this writer, 1562, to have been no farther relieved, than by an exemption from the strict laws of slavery:—“*Vidimus enim hujusmodi captivos remanere liberos, imponi tamen eis jugum redemptionis, quanti possint, aut quanti convenit, et interim sunt apud capientes jure pignoris, et si nolunt se redimere, possunt ad hoc compelli; quod faciunt milites, etiam per*

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3

per tormenta." *Ib. pt. 4. tit. 1.* The extent of the mitigating principle, whatever it might be, was strictly confined to Christian prisoners. With the *Turks* and *Moors*, the ancient system was still thought worthy to be continued in full vigor:—"Quamvis autem in bellis quæ inter Christianos sæpe nimium geruntur, raro possint esse in usu, jura postliminii, maxime ea, quæ de homine sunt conscripta; possunt tamen esse in his, quæ cum Turcis et Mauris geruntur, cum quibus antiquum jus gentium servatur; unde et multi possunt casus contingere, in quibus ad hæc postliminii jura recurri oportet." *Ib. pt. 3. t. 1.*: And with respect to the nations of *Europe*, it is very certain that for many centuries after the establishment of Christianity, they continued to pursue practices in regard to prisoners of war amongst themselves, that were most *unchristian* and sanguinary. See, on this subject, Mr. *Ward's Law of Nations*, v. 1. p. 223. *et seq.*

The practice of ransoming prisoners of war has prevailed in all times; and so early as the middle of the sixteenth century, at least, we read of stipulations (a) for a general return of prisoners in treaties of peace. It might have been supposed, that this would have proved a material step towards the more public and systematic exchange, during the course of a long war, which has since been introduced: It might accordingly, in all probability, have led much earlier to a general amelioration of the state of war in this respect; if there had not been collateral causes, to counteract the natural impulse of men's minds, and to pervert their sense, of the common interests of nations, on this subject. Amongst these causes may be reckoned, as no immaterial obstacle, that popular law of arms, which gave to the immediate taker, the power and controul over the person of his prisoner, and entitled him to appropriate to himself the profit of his ransom, as the great booty of war,

The Black Book of the Admiralty, which contains many things relating to the law of arms, and a chapter respecting the office of the constable and marshall in time of war, lays down the following rules, for the taking, and keeping, and ransoming, of prisoners: "Also, be it at battaill, or at any other deede of armes, where that prisoners be taken, he that first may have his faith, shall have hym for his prisoner; and he shall not nede to abide upon the warde of hym, to the end of his journey; and none other shall [moreover] take hym, ne have hym for prisoner; but it be founde for his—also, if any enemy be born to ground, he that hath borne him to

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the erthe afore, if any other come after and take his faith, he that taketh his faith, shall have the half raunceon of this prisoner; and he that hath him down the other half, but he that taketh his feith, shall have the warde of hym, makynge surete to his partner—also, that every man paye his thirds to his lord capiten, or maister, of all maner wynnyn of werre—and if any man take any prisoner [*as soon*] as he is taken in the oost, that he bring his prisoner to his capiten or maistre; and that, upon peyne of lose of his parte, to his said capiten or maistre, shall bring him within 8 days to the kyng, constable, or mareshall, as soon as he goodly may. So that he be no other way, upon peyne to lose his parte, to him to be given, that shall give to the constable and mareshall first warning thereof. And that every man kepe or doo kepe his prisoner, that he fede not at large in hosteyng, ne goo at large in loggyng, but yf a wayte be had upon him, upon peyne to lose his prisoner; reserving to his maistre, or lorde, his thirde of the whole, if he be not partner of the default; and the second part to hym, that shall now first fynde him, and the thirde parte, to the constable, upon the same peyne."

It may be objected, that the private interest of the captor would apply, not more strongly, to exchanges during war, than to stipulations for a general return, in treaties of peace—and it may not be easy to assign a reason, why it should not. The fact is however that we meet with earlier traces of the one practice, than of the other. There might be circumstances accounting for the distinction; or it may admit only of this answer, that the extension of general principles, as it unfolds itself in matters of practice, is of very slow and unequal growth. In what manner, the captor's rights and the public interest were compromised on these latter occasions does not appear.—But that the private interest of the captor did in some measure operate unfavourably, so as to render the terms of release more burdensome, and less likely to be conducted, on any general principle of benevolence, or on any distinct view of reciprocal advantage, is proved by the following passage from *Bellus*. He is reprehending a practice of transferring the interest in prisoners, by which the price of their ransom was much enhanced, and adds, "ego tamen vidi magnos viros in castris non abstinentes hoc contractu, et maxima tales consecutos, etiam ad quinquaginta scutorum millia, cum captivus vix quingentis aut mille yenisset; et propterea dubito quod *difficillimum esset succurrere captivo*, quin staretur usui castrorum, licet equiorum et justiorum credam

credam priorem contrariam partem." *Bellus*, pt. 4. t. 3. The extracts that have been made from this writer, who was Judge or Assessor in the armies of Ch. V. and Ph. II. authorize us to conjecture, that no practice so general, and so favourable to the condition of prisoners, as a public exchange in time of war, was known during the principal part of the 16th century. The private interest of the captor, seems to have continued, through this period. The exact time, at which it ceased, may not, perhaps, be easily ascertained. From a proclamation of Charles I. 1628, we may infer that the private interest in prisoners had not been entirely discontinued at that time; as we see that the individual captors were, in some cases, enjoined, to keep them at their own expence, till they were ransomed or exchanged: From which it may not unreasonably be inferred, that their interest in them was not entirely extinguished. "For as much as during the hostility between us and the kings of France and Spain, divers of their subjects have been taken at sea, and brought into this kingdom as prisoners by private men of war, and suffered to pass up and down freely, &c. We do hereby declare our royal pleasure and command, that all such persons as either already are, or at any time hereafter shall be brought into this kingdom by a private man of war as prisoners, shall be kept in prison and safe custody, at the charge of those who shall so bring them in, untill they shall hence be delivered and sent backe unto their several countries, either *by way of exchange for our subjects* which shall happen to be prisoners there, or otherwise. 23d July 1628." *Rym.* v. 18. p. 1035. It appears not improbable that this was a season of ambiguous practice, between the two systems. The expence of the captor continued, and we may infer from that, his emolument also. No public measure seems, before, to have been concerted, to create an exchangeable fund of prisoners, if it may be so expressed, on the account of the public—yet the latter part of the proclamation seems to point to an exchange, in some respects, similar to what is now practised; except, that it does not appear, whether it was to take place during the continuance of the war.

It is not to be concealed in this place, that *Grotius*, in his *Hist. Belg.* an. 1593, speaks of *commutatio captivorum*, as a return to former practice:—"Hæc (*i. e.*, the enormities arising from a system that had been adopted by the Spanish commander of giving no quarter, &c.) docuerunt mirari vetera, præsentibus obsequi, reditumque ad morem, ut pro agris tributum penderetur, *captivorum commutatio*

APPENDIX, A.

the erthe afore, if any other come after stipendio exsolverentur." taketh his faith, shall have the ha^ve pose that this was not a public and he that hath him down the o^r fiscised. In his great work, *de Jure feith, shall have the warde*, ^{to have adverted to it, as a practice} ner—also, that every man ^{observation on the mode of carrying it} maister, of all maner w^{ch} mention of the term cartel, although in prisoner [as soon] as ^{invention of} *Barbeyrac*, speaking in the language of soner to his capit^l ^{it, l. 3. ch. 14. s. 9. 3.—The words of Gro-} his parte, to h^v ^{is practice limited, to the consideration of the prisoner's means} days to the ^{himself, that they afford an additional reason for sup-} may. S^{ic} ^{general cartels, at the expence of the public; had not then} to him ^{to produce,} "At quas apud gentes jus servitutis ex bello in firs

presto non iniquo; hoc quale sit, præcise definiri non potest; sed
humana docet non ultra intendi debere, quam deducto, ne
GREAT CAPTUS rebus necessariis." From which it is to be infer-
~~red, that the prisoner paid his own ransom.~~ "Alibi hoc pactis aut
~~moriibus definitur," and then follow several references, all of them to
ancient history. Had the practice been so known, as to have as-
sumed a regular character, and to have been attended with es-
tablished forms, amongst the nations of *Europe*, it would have been
natural for him to have given some account of them in this place.~~

Of the propriety of the preceding conjecture, the reader must judge for himself, on the facts which are here introduced, and his own better knowledge. At a later period, we arrive at greater certainty. In the year 1665, there is mention of a person coming to *England*, in a public capacity, to negociate an exchange of prisoners, between this country and *Holland*, then at war. *D'Estrade's Lettres*, v. 3. p. 475. In 1701, it appears, from *Lamberty's Memoirs*, vol. 1. p. 694. to have been practised between the *French* and the Imperial army in *Italy*. The letters of the commanders, Prince *Eugene* and the Prince *Du Vaudemont*, express "that a cartel should be settled on the footing of the late war, in *Piedmont*, or on the *Rhine*." For a modern treaty on this subject, see the treaty between *England* and *France*, 12th *March* 1780, in which, as a sequel to an exchange *per rank*, a money price is established—60*l*, for an admiral, commander in chief, and 1*l*. for a common mariner, &c, with other intermediate prices: By which on a default of corresponding ranks, the compensation was made up, by numbers of an inferior degree; or, when these were all expended, by a money price. *Martin's Treaties*, vol. 4. p. 276.

APPENDIX, B.

B

(*Note to Page 22.*)

THE ANGELIQUE, STRENG Master.

Angelique a case of very strong and particular circumstances, presented itself to the Court of Appeal.—It was the case of a ship and cargo taken on a voyage from *Madras* to the Spanish settlement of *Manilla*, and claimed on behalf of Armenian merchants, resident in *Madras*. It was asserted on the part of the claimant, that a trade of this nature had been carried on by this peculiar class of merchants, under the knowledge and permission of the government of *Madras*; and that it had in former wars also been a trade specially privileged by the *East India Company's* governing officers in *India*, and by the *Spanish* government at *Manilla*. It appeared also, that there had been a subsequent permission of the Governor of *Madras*, Lord *Clive*, and of the Governor General Lord *Mornington*, for the carrying on a similar trade, granted to the claimant in this case—and the application stated, that it had been usual to trade in this manner, without consulting government; but that the application was now made in consequence of the capture of the *Angelique*.—It was said farther, that there was a legal opinion of the Attorney General (a) of *Madras*, under a certificate from Lord *Mornington* and Lord *Clive*, and the persons constituting the council at *Madras*, stating their opinion of the legality of the trade, and representing the extreme hardship of the case to the Vice Admiralty Court of the *Cape of Good Hope* (a).

Lords, Aug. 12,
1801.

(a) Mr. Sullivan.

After

(a) From that opinion, I take the liberty of extracting the following account of the persons called Armenian merchants :—

It states, “ that in the year 1688, a treaty or agreement was entered into between the Old Company and the Armenian Nation; by which the latter, in consideration of their changing the ancient course of their trade to *Europe*, (till then carried on to a great extent by the way of *Turkey*), and sending their goods on to the Company's ships to *London*, by which the customs were expected to be greatly increased, were granted, within the Company's limits, all the privileges enjoyed by British subjects; and were licensed to trade to and from *Europe*, on the Company's vessels on equal terms. For many years before this, they had had a free and uninterrupted trade

APPENDIX, B.

After a very full hearing, the Court of Appeal were of opinion, that by the general law, all foreigners resident within the *British* dominions incurred all the obligations of *British* subjects—that there was nothing to distinguish this particular class of merchants, in point of law, from the general rule—that, whatever doubt might be entertained, whether the *East India Company* might not, in wars in *India*, originating with them, under the power of their charter, relax the operation of war, so far as to license the trade of individuals with such an enemy; they could unquestionably have no such power, in respect to a trade carried on with a general and public enemy of the crown of *Great Britain*—that it would on that account be useless to admit the claimants to prove, as it was offered, the fact of a tacit or acknowledged permission, from the Governor in council in *India*. The Court seemed to admit, that the trade in question might be a very lucrative trade, in a public point of view; as it was the means of carrying the silver, received by the *Armenian* merchants in *Manilla* for the exports of the Company's manufactures, on to *China*, where it was vested, as a fund for the purchases, made by the *East India Company*, the private merchants taking in payment bills on the Company in *India*. They thought, that on these grounds there might perhaps be reason for making particular regulations in future for such a trade;

trade to *Manilla*, (from which the Company were excluded by the treaty of *Madrid* in June 1670), and this commerce was by the agreement allowed to be carried on directly from the Company's settlements, in any ships which had their permission to trade: Having been before received as neutral subjects of *Persia*, or as temporary subjects of the *Mogul Empire*, the residence of some *Armenian* families in the Company's factories, was not, from the nature of these factories, considered by the *Spaniards* as a circumstance of sufficient weight to exclude them from the port of *Manilla*, or a reason for depriving them, of their ancient advantages of trade by treating them as *English* subjects. It is now 100 years since the treaty or agreement was entered into, and during that period the *Armenians* have continued to be received at *Manilla* as they had at all times before, as subjects of *Persia* or the king of *Delhi*; and in the various wars we have had with *Spain* since 1688, though coming directly from our ports, they have uniformly been considered and treated by the *Spaniards*, as a neutral nation."

APPENDIX, B.

trade; but being of opinion, that, as it was in the power of the crown alone, to declare war, so, it rested with that authority only to dispense with its operations, they affirmed the sentence of the Vice Admiralty Court, and condemned the ship and cargo, as the property of *British* subjects taken in trade with the enemy.

Being impressed with a conviction of the *bona fide* conduct of the parties, and considering that they had been led into a mistake, under a public misapprehension prevailing in *India*, even on the part of the Governing Persons there, the Court directed the expences of the suit to be paid out of the proceeds.

No. I.

CERTIFICATE of consuls at Smyrna, exhibited in the cause relating to the Herman.

(Translated from the *Italian*.)

WE, the undersigned consuls, do certify, that, except the French and English nations which are established here with an exclusive commerce of the *Levant*, with their respective States, no other nation has factories belonging and appropriated to it; but that every European native or descendant, and every Ottoman subject carries on, promiscuously, and equally, the commerce of the city of *Smyrna*, both importation and exportation, with those of *Germany*, *Italy*, *Muscovy*, *Holland*, and others not in the States of *England* and *France*.

That the individuals, natives and descendants of the aforesaid States, known and comprehended by the *Turks*, under the name of *Frank* or *Mustemen*, which is to say,—free and independent, are looked upon by them as a people exempt from their dominion, that under favour of the protection of the Grand Signior, enjoy the franchise and liberty of exercising commerce and arts in his States.

That it is consequently at the option of such individuals to put themselves under which consul they please, and withdraw from him to go to another; so that you here see *Imperialists*, *Sicilians*, *Swedes*, *Danes*, *Venetians*, *Genoese*, *Saroyards*, *Swiss*, and *Maltese*, live indifferently under consuls of their own or of a foreign nation; nor does the protection under which they are, acquire to, or impose on them, the character of citizens or subjects of that prince, under whose consul they remain.

Smyrna, August 29, 1781.

APPENDIX, No. I.

CERTIFICATE from the Secretary of the Dutch
Levant trade, exhibited in the cause relating to
the *Herman*.

1. The Dutch establishment at *Smyrna* is founded on the capitulation or privileges, granted by the *Ottoman* court, to all *Europeans* or *Franks* in general, to reside and carry on trade in the *Ottoman* dominions, under the protection of their respective ambassadors and consuls, and the laws in use among the *Europeans*.
2. The Dutch establishment at *Smyrna* is called in the acts, the consulate of the *Netherlands*: this being also the denomination in the acts passed by the several consuls of the Dutch nation at *Leghorn*, *Cadiz*, *Malaga*, and other places in the *Mediterranean*.
3. The Dutch consuls as well at *Smyrna* as in other places, are appointed by the States General.
4. The consulate duties on ships and goods at *Smyrna*, and in all other ports of the *Mediterranean*, are regulated by the States General, and differ in the several places.
5. The States General have erected a college in *Holland*, under the name of the *Levant* trade and navigation in the *Mediterranean*, whose business it is to inspect the transactions of the consuls in the *Levant* and ports of the *Mediterranean*, whither their jurisdiction extends; to take care that the consulate duties in the several ports be paid agreeable to the tariff ordajned by their High Mightinesses, and the produce be applied to the support of the consuls, &c. &c. &c. and other charges.
6. There is no Dutch factory at *Smyrna*, nor any *Levant* company in *Holland*. The trade from and to *Holland* is open to all nations, and is more properly called a society of Dutch-born subjects, and descendants of *Hollanders*, born in *Turky* and emigrated from hence; as likewise of subjects of other powers, who have united themselves to enjoy on one and the same footing, the protection

tection of the *Dutch* ambassador, and the privileges of the general *European* capitulation granted by the *Ottoman* empire.

7. The *Dutch* establishment at *Smyrna* is not restricted to *Dutch* subjects. Subjects of other powers are admitted therein, and have liberty to become members of the *Dutch* establishment; but must submit to pay the *Dutch* consulate for support of the consuls, &c. and to take an oath to observe and perform all regulations.

8. Among those who are members of the *Dutch* establishment, are *Demetris Baltazzi*, *Bartendorff* and *Sewaeld*, and *Esaie Fercken*, *Imperial* and *Greek Ottoman* subjects.

9. Any person whosoever may trade from *Turky* to *Holland*, on one and the same footing, whether *Dutch* subjects or not, and whether members of the *Dutch* establishment or not, and may load ships at *Smyrna* for *Holland*; though a higher duty is paid in *Holland* on goods coming from thence in foreign ships, than upon those which are brought by *Dutch* ships.

10. Members of the *Dutch* establishment at *Smyrna*, whether *Hollanders* by birth, descendants of *Dutch* subjects in the *Levant*, or subjects of other powers, are in all respects upon an equal footing, enjoying the same protection, and are subject to the same ordinances of that society.

11. For encouragement to become members of the *Dutch* establishment in the *Levant*, and to augment the trade, the children baptized in the chapel of the ambassadors or the consuls are considered *Dutch* subjects; and when out of their country they enjoy the protection of the ambassadors of their High Mightinesses; and when they come to reside in *Holland*, have all the privileges of *Dutch*-born subjects; and this extends as well to the descendants of *Hollanders* born, as of subjects of other powers, who are members of the *Dutch* establishment in the *Levant*.

12. From all this it very clearly appears that the *Dutch* establishment at *Smyrna* is by no means a factory; that it has no exclusive privileges of trade; is not bound or restricted by a *Levant* company in *Holland*, nor even granted to *Hollanders* only. Moreover

APPENDIX, No. I.

over the members of the *Dutch* establishment in the *Levant*, may not have any share in the *Dutch* ships without the approbation of their High Mightinesses the States General, to whom a petition for that purpose must be delivered. From hence it follows, that if the *Dutch* establishment in the *Levant* was considered as a factory, they would have a right to that which they are now obliged to ask as a favour, on the same footing as *Hollanders* born, residing at *Lisbon*, *Leghorn*, *Cadiz*, or other foreign trading cities; and this right would be confined to natives of *Holland* only. Whereas it is now granted to the members of the *Dutch* establishment at *Smyrna* who are born there, or that are subjects of other powers.

I, the underwritten secretary to the *Levant* trade and navigation in the *Mediterranean*, do hereby certify, That the foregoing articles contain the terms on which the *Dutch* establishment in all the maritime scales of the *Levant* and other ports of the *Mediterranean* are carried on; and therefore all the articles therein contained, are drawn up agreeable to the truth. In testimony whereof these presents are signed by me, and confirmed with the seal of office of the direction in *Amsterdam*, the 18th of *September*, 1781.

(L. S.) J. J. VAN HOLST.

Faithfully translated from the original, out of *Low Dutch*.
into *Engl. ijk*.
London, the 26th of *September*, 1781.

Quod attestor,
(L. S.) PIETER HENDRICK HOOGENBERG.
Not. Pub.

No. II.

A PROCLAMATION, declaring what ensigns or colours shall be borne at sea in merchant ships or vessels, belonging to any of His Majesty's subjects of the United Kingdom of *Great Britain* and *Ireland*, and the dominions thereunto belonging.

GEORGE R.

WHEREAS by the first articles of union of the kingdoms of *Great Britain* and *Ireland*, as the same have been ratified and confirmed by two acts of parliament, the one made in our parliament of *Great Britain*, and the other in our parliament of *Ireland*, it was provided, that the ensigns armorial, flags, and banners of our United Kingdom of *Great Britain* and *Ireland*, should be such as we should appoint by our royal proclamation, under the great seal of our said United Kingdom: and whereas we have, by our royal proclamation dated this day, appointed and declared, that the arms or ensigns armorial of the said United Kingdom should be as therein expressed: and whereas according to ancient usage, the ensigns, flags, jacks, and pendants worn by our ships, and appointed as a distinction for the same, ought not to be worn on board any ship or vessel belonging to any of our subjects, so that our ships and those of our subjects may be easily distinguished and known: we have therefore thought fit, by and with the advice of our privy council, to order and appoint the ensign, described on the side or margin hereof, to be worn on board all ships or vessels belonging to any of our subjects whatsoever; and to issue this our royal proclamation to notify the same to all our loving subjects, hereby strictly charging and commanding the masters of all merchant ships and vessels belonging to any of our subjects, whether employed in our service or otherwise, and all other persons whom it may concern, to wear the said ensign on board their ships or vessels: and to the end that none of our subjects may presume on board their ships to wear our flags, jacks, and pendants, which, according to ancient usage, have been appointed as a distinction to our ships; or any flags, jacks, or pendants, in shape and mixture of colours so far resembling

APPENDIX, No. II.

sembling ours as not to be easily distinguished therefrom: we do, with the advice of our Privy Council, hereby strictly charge and command all our subjects whatsoever, that they do not presume to wear in any of their ships or vessels, our jack, commonly called *The Union Jack*, nor any pendants, nor any such colours as are usually borne by our ships, without particular warrant for their so doing from us, or our High Admiral of *Great Britain*, or the commissioners for executing the office of High Admiral for the time being: and we do hereby also further command all our loving subjects, that without such warrant as aforesaid, they presume not to wear on board their ships or vessels any flags, jacks, pendants, or colours, made in imitation of or resembling ours, or any kind of pendant whatsoever, or any other ensign than the ensign described on the side or margin hereof, which shall be worn instead of the ensign before this time usually worn in merchant ships; saving, that for the better distinction of such ships as shall have commissions of letters of mart or reprizals against the enemy, and any other ships or vessels which may be employed by the principal officers and commissioners of our navy, the principal officers of our ordnance, the commissioners for victualling our navy, the commissioners for our customs and excise, and the commissioners for transporration for our service, relating particularly to those offices, our royal will and pleasure is, that all such ships as have commissions of letters of mart or reprizals, shall, besides the colours or ensign hereby appointed to be worn by merchant ships, wear a red jack with a union jack, described in a canton at the upper corner thereof next the staff; and that such ships and vessels as shall be employed for our service by the principal officers and commissioners of our navy, the principal officers of our ordnance, the commissioners for victualling our navy, the commissioners for our customs and excise, and the commissioners for transportation for our service, relating particularly to those offices, shall wear a red jack with a union jack in a canton at the upper corner thereof next the staff as aforesaid, and in the other part of the said jack shall be described the seal used in such of the respective offices aforesaid, by which the said ships and vessels shall be employed. And we do strictly charge and command, that none of our loving subjects do presume to wear any of the said distinction-jacks, unless they shall have commissions of letters of mart or reprizals, or be employed in our service by any of the before-mentioned officers. And we hereby require our High Admiral, and commissioners for executing

executing the office of High Admiral, the governors of our forts and castles, the officers of our customs, and the commanders or officers of any of our ships for the time being, upon their meeting with, or otherwise observing any ships or vessels belonging to any of our subjects, neglecting to wear the ensign hereby appointed, to be borne as aforesaid, or wearing any flag, pendant, jack, or ensign, contrary hereunto, whether at sea or in port, not only to seize, or cause to be forthwith seized, such flag, pendant, jack, or ensign, worn contrary to our royal will and pleasure herein expressed, but also to return the names of such ships and vessels neglecting to wear the ensign hereby appointed, or wearing any flag, pendant, jack, or ensign, contrary hereunto, together with the names of their respective masters or commanders, unto our High Admiral, or commissioners for executing the office of High Admiral, or the Judge of our High Court of Admiralty for the time being, to the end that all persons offending may be duly punished for the same. And we do hereby command and enjoin the Judge and Judges of our High Court of Admiralty for the time being, that they make strict enquiry concerning all such offenders, and cause them to be duly punished: and all Vice Admirals, and Judges of the Vice Admiralties, are hereby also required to proceed in the like manner, within the several ports and places belonging to their respective precincts. And our further pleasure is, that this proclamation shall take place according to the times hereafter mentioned; *videlicet*, for all ships in the Channel or British Seas, and in the North Seas, after twelve days from the date of these presents; and from the mouth of the Channel unto Cape *Saint Vincent*, after six weeks from the date of these presents; and beyond the Cape, and on this side the Equinoctial Line, as well in the Ocean and *Mediterranean* as elsewhere, after ten weeks from the date of these presents; and beyond the Line, after the space of eight months from the date of these presents (a).

Given at our court at St. James's, the first day of January, one thousand eight hundred and one, in the forty-first year of our reign.

(a) In pursuance of the 1st article of the union between *England* and *Scotland*, there was a similar proclamation, from which, as to the form of words, this appears to have been copied.

No. III.

C A P. XCVI.

AN act for the better regulation of His Majesty's Prize Courts in the *West Indies* and *America*, and for giving a more speedy and effectual execution to the decrees of the Lords Commissioners of Appeals.

[2d July 1801.]

Preamble.

WHEREAS your Majesty has been pleased, by a letter of Lord Grenville, one of your Majesty's principal secretaries of state, bearing date the twenty-second day of January one thousand eight hundred and one, to direct the Lords Commissioners of the Admiralty to revoke the commissions of prize heretofore granted to the Vice Admiralty Courts in the *West Indies*, except at *Jamaica* and *Martinico*: and whereas it is fit and may tend to the due administration of justice, that your Majesty should be enabled to make competent provision for the several Judges of Vice Admiralty Courts in any two of the islands in the *West Indies*, and at *Halifax* in *America*; and that the proceedings of the said Courts, and the fees of the Judges and other Officers of the said Courts, should be duly regulated; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same,

That from and after the passing of this act it shall be lawful for his Majesty, his heirs and successors, by any order in Council, to fix and ascertain proper and adequate salaries for the said Judges of the Vice Admiralty Courts established in any two of the islands in the *West Indies*, and likewise at *Halifax* in *America*, not exceeding the sum of two thousand pounds *per annum* for any one of such Judges; and such salary shall be issued, payable, and paid out of the consolidated fund of *Great Britain*.

His Majesty may, by order in council, fix salaries for Judges of the Vice Admiralty Courts in the *West Indies*, and at *Halifax* in *America*;

and by Letters Patent may grant to any such Judge,

II. And be it further enacted, That it shall be lawful for his Majesty, by any letters patent under the great seal of *Great Britain*, to give and grant to any such Judge upon his resignation of any

any such office, an annuity for the term of his life, not exceeding one thousand pounds, to be issued and payable, and paid out of the consolidated fund; and such annuity shall be charged and payable out of the consolidated fund. upon resignation, as an annuity payable out of the consolidated fund.

chargeable, and paid and payable in like manner in every respect, and under and subject to such rules, regulations, provisions, penalties, and forfeitures as are contained in an act passed in the thirty-ninth year of the reign of His present Majesty, intituled, *An act for the augmentation of the salaries of the Judges of the Courts in Westminster Hall, and also of the Lords of Session, Lords Commissioners of Justiciary, and Barons of Exchequer in Scotland, and for enabling His Majesty to grant annuities to persons in certain offices in the said Courts of Westminster Hall, on their resignation of their respective offices:* Provided always, That no such annuity granted to any such Judge shall be valid, unless such Judge shall have continu'd in one or more of the said offices for the period of six years, or shall be afflicted with some permanent infirmity, disabling him from the due execution of his office, which shall be distinctly recited in the said grant. No such annuity to be valid, unless the Judge shall have continu'd in office for six years, or be unable to do the duty.

III. And be it further enacted, That it shall be lawful for his Majesty, his heirs and successors, to establish rules and regulations for the said Courts, and from time to time to regulate the fees to be taken by the said Judges, and the other officers of the said Courts, for all acts to be done therein, and to alter and amend such rules and regulations, and make any new table or tables of fees, as his said Majesty, by and with the advice of his council, shall deem fit.

His Majesty may establish rules for the Courts, and regulate the fees to be taken.

IV. And be it further enacted, That the profits and emoluments of the said Judges shall in no case exceed the sum of two thousand pounds to each or any or either of the said Judges in any one year, and so in proportion for any part of a year, over and above the salary of such Judge by this act granted, and every such Judge shall keep a just and true account of the fees and pecuniary profits and emoluments received by him as such Judge in each year, ending on the first day of *January* in each year, and shall, as soon after the said first day of *January* as the same can be done, in every year, transmit an account thereof to the commissioners of the navy, and shall carry all sum and sums of money exceeding the said sum of two thousand pounds to the account of the succeeding year, or pay the same or any part thereof to such person or persons,

The profits of each Judge shall not exceed 2,000*L*. per annum over his salary, and he shall keep an account thereof, and transmit it annually to the commissioners of the navy.

APPENDIX, No. III.

and in such manner as to the said commissioners of the navy shall seem fit, and they shall for that purpose direct.

The Courts may exercise over all prizes, &c. the same powers as if they had been brought into any port of the island or colony where such Courts are held.

V. And whereas it is expedient that the powers of the said Courts, and the execution of their processes, should be rendered more effectual and easy, be it therefore enacted, That each and every of the said Courts, and the several and respective Judges and Officers thereof in any two of the islands in the *West Indies* and at *Halifax*, shall have and may exercise over all prizes carried into any of his Majesty's colonies in the *West Indies*, including therein the *Bahama* and *Bermuda* islands, and over all persons in any way concerned therein, and in all matters and things relating thereto, all the powers and authoritics, and shall and may put in force all the regulations, provisions, penalties, forfeitures, matters, and things relating thereto, as if such prizes had been actually brought into any port of the island or colony where such Vice Admiralty Court shall be held; and as if the persons concerned therein were actually resident in such island or colony.

The Courts may issue commissions, &c. to be executed in any other of His Majesty's colonies or territories in the West Indies or America, &c. for any purpose of legal adjudication, and all marshals, &c. shall execute processes issuing from such Courts.

VI. And be it further enacted, That it shall be lawful for the Judges and other Officers of the said Courts to issue commissions, orders, decrees, attachments, and other processes, to be executed in any other of his Majesty's colonies or territories in the *West Indies* or *America*, including therein the *Bahamas* and *Bermuda* islands, for the examination of witnesses, for the appraisement and sale of captured property, or for any other purpose of legal adjudication; and all such commissions, orders, decrees, attachments, and processes, shall be valid and effectual, and shall be in full force, and be put in execution, in relation to all matters and things cognizable by such Courts, in every part of his Majesty's colonies, plantations, and territories in the *West Indies* and *America*, including therein the said islands of *Bahama* and *Bermuda*, notwithstanding any law or laws of any such colonies, plantations, or territories to the contrary thereof; and all marshals and deputy marshals, or other officers executing processes of any similar nature, or in default of any such being resident in any island or colony, all officers executing any legal processes, by whatever name or names any such officer shall be called, shall and are hereby required to execute the processes issuing from the said Courts, and shall be liable to such fines, penalties, forfeitures, or punishments, for any contempt or any neglect in executing thereof, as any officer or officers

officers of such or the like description are liable to for any neglect' and as if such Court was established and held in the island, colony, or territory within which the functions of any such officers are to be exercised as aforesaid.

VII. And whereas it is expedient that the proceeds of property captured and converted by sale, should be secured until final adjudication; be it enacted, That in all cases where a commission of appraisement and sale is granted by the Judge of the Vice Admiralty Court before final sentence, the proceeds of such sale shall not remain in the hands of the captors or their agents, but shall be brought into the registry of the Court, and remain subject to the further orders of the Court till final sentence.

Where a commission of appraisement and sale is granted before final sentence, the proceeds shall be brought into the registry of the Court.

VIII. And whereas injury is frequently sustained in the sale of captured property in remote parts of his Majesty's dominions, where there are unsuitable markets for such sales; be it therefore enacted, That in case of any order for further proof made by any Court of Vice Admiralty, and the claimants thereof declining to take the property whereon such question shall arise upon bail, it shall be lawful for the Court before which such question shall be depending, with the consent of the captors and claimants, or their respective agents, to direct such property to be sent to *England*, and there to be sold by consignees, to be named by such parties as aforesaid, and the proceeds of the sale to be forthwith deposited in the bank of *England*, in the names of such consignees, subject to the final adjudication, the expences of freight, insurance, and other charges attending the transportation and sale of the property, to be a charge thereon; and in case it shall appear to any such Court that the consent of the captors shall in any such case be unreasonably withheld, the captors shall (in case of restoration) be adjudged and made answerable, and shall pay such sum as shall be adjudged in any such Court to be equal to the difference in value of the property at the time of such restoration, and what would have been the produce thereof if it had been sent for sale to *England*, such difference to be ascertained in such Courts, by such ways and means, and such evidence as to what such property would have been sold for in *Great Britain*, and as to the charges to which the same would have been subject, as such Court shall deem satisfactory for that purpose.

If claimants decline to take property on bail, the Court, with consent of the captors and claimants, may direct it to be sent to *England* for sale; and if the captors unreasonably withhold their consent, they shall pay the difference of the value at the time of restoration, and of the produce if it had been sent to *England*.

APPENDIX, No. III.

At request of appellants, the Court may direct the property to be sent to England for sale, and the proceeds to be deposited in the bank, or the proceeds of property sold may be so sent and deposited ; and if any difficulty arise, the captors or claimants may apply by their proctors to the High Court of Admiralty, or the Lords Commissioners of Appeal, for their directions.

IX. And be it further enacted, That if on any final sentence or adjudication of any such Court, an appeal shall be duly entered, it shall be lawful for the Court from which such appeal shall be made, at the requisition of the appellant, to direct the property on which such sentence or adjudication shall have taken place, to be sent to *England* for sale in like manner as is herein-before directed, and the proceeds to be deposited in the bank to abide the decision of the Lords Commissioners of Appeal; or in case the property shall have been converted by sale, the proceeds thereof shall be sent and deposited in like manner ; and in case any question or difficulty shall arise respecting any such property or proceeds sent to *England*, either before or after any such appeal, at any time after their arrival in *England*, or respecting the sale or proceeds thereof, it shall be competent for either of the captors or claimants thereof, or their respective agents, upon notice to the adverse parties, or their agents, to apply by their proctor or proctors to the High Court of Admiralty of the United Kingdom of *Great Britain* and *Ireland*, if before the appeal prosecuted, or afterwards to the Lords Commissioners of Appeal, for directions in regard to the sale or management of such property or proceeds, and the said High Court of Admiralty or Lords Commissioners aforementioned respectively are hereby authorized to give such order and direction therein as the nature and circumstances of the case may require, for the security of the property or proceeds, or for the beneficial employment of the said proceeds in government securities for the benefit of the parties who may ultimately be entitled, and to cause such order and directions to be enforced and put in execution, if the same shall be necessary, by such and the like ways and means, and under and subject to such penalties, forfeitures, regulations, and restrictions, as such Court or Lords Commissioners respectively may use or exercise, in relation to any property, or person or persons, subject to the jurisdiction or controul of such Court or Lords Commissioners respectively.

In processes of the Court of Appeal, service upon His Majesty's proctor shall be deemed service upon the captain of a King's ship : and in the

X. And whereas great inconveniences have heretofore arisen from delays in serving the processes of the Court of Appeal for obtaining appearances and other interlocutory orders ; be it therefore enacted, That in all cases of captures by his Majesty's ships, a service upon his Majesty's proctor shall be deemed an effectual service upon the commander of the ship making such capture ; and that upon the taking out of all letters of marque, the owners

of the ships or vessels in respect whereof such letters of marque shall be granted, shall nominate and register in the Court granting such letter of marque a proctor exercient in the Court of Appeal in prize causes, with power of revocation and substitution; and a service of process upon such proctor shall be deemed an effectual service upon the commander, owners, and sureties of privateers in all cases where an appeal has been declared in the Court below within fourteen days after sentence; and in case any privateer shall proceed to adjudication against any prize in any other Court than that from which the letters of marque shall have issued for such privateer, it shall be necessary that a proctor shall be registered as aforesaid, together with the names of the owners of and sureties for the said privateer, before the usual monition is granted, upon which proctor in like manner the service of the process of the Court of Appeal shall be effectual: Provided nevertheless, That His Majesty's proctor, or any proctor nominated as aforesaid, shall not be answerable for any damages arising to their parties respectively, from no appearance being given in their behalf in the Court of Appeal, unless the proctor so nominated shall have accepted such nomination by a writing under his hand, and also unless the said parties respectively shall have sufficiently instructed their said proctors to appear and defend the appeal.

XI. And be it further enacted, That in all cases where no appeal has been entered as aforesaid, a service of the process either upon the commander of the King's ship, or upon his registered agent in this kingdom, or upon his Majesty's law officer in the Court below, or in cases of captures made by privateers, upon the commander of the privateer, or upon either or any of the sureties to the letters of marque, shall be deemed a sufficient service, upon the parties.

What shall be deemed sufficient service, where no appeal has been entered as aforesaid.

XII. And be it further enacted, That in all proceedings had upon captures made by any privateer, the owners shall be deemed and considered parties to all and every part of such proceedings, and the said owners, and likewise the sureties, shall be jointly and severally liable to all orders and decrees made therein and made upon them respectively, immediately after final sentence, without further personal service upon the commander, or putting him in contempt by process of contumacy.

In proceedings upon captures by privateers the owners to be considered parties, and they and the sureties liable to decrees immediately after final sentence.

XIII. Provided

APPENDIX, No. I.

over the members of the *Dutch* establishment in the *Levant*, may not have any share in the *Dutch* ships without the approbation of their High Mightinesses the States General, to whom a petition for that purpose must be delivered. From hence it follows, that if the *Dutch* establishment in the *Levant* was considered as a factory, they would have a right to that which they are now obliged to ask as a favour, on the same footing as *Hollanders* born, residing at *Lisbon*, *Leghorn*, *Cadiz*, or other foreign trading cities; and this right would be confined to natives of *Holland* only. Whereas it is now granted to the members of the *Dutch* establishment at *Smyrna* who are born there, or that are subjects of other powers.

I, the underwritten secretary to the *Levant* trade and navigation in the *Mediterranean*, do hereby certify, That the foregoing articles contain the terms on which the *Dutch* establishment in all the maritime scales of the *Levant* and other ports of the *Mediterranean* are carried on; and therefore all the articles therein contained, are drawn up agreeable to the truth. In testimony whereof these presents are signed by me, and confirmed with the seal of office of the direction in *Amsterdam*, the 18th of *September*, 1781.

(L. S.) J. J. VAN HOLST.

Faithfully translated from the original, out of *Low Dutch*
into *Engl. ish.*

London, the 26th of *September*, 1781.

Quod attestor,
(L. S.) PIETER HENDRICK HOOGENBERG,
Not. Pub.

No. II.

A PROCLAMATION, declaring what ensigns or colours shall be borne at sea in merchant ships or vessels, belonging to any of His Majesty's subjects of the United Kingdom of *Great Britain* and *Ireland*, and the dominions thereunto belonging.

G E O R G E R.

WHEREAS by the first articles of union of the kingdoms of *Great Britain* and *Ireland*, as the same have been ratified and confirmed by two acts of parliament, the one made in our parliament of *Great Britain*, and the other in our parliament of *Ireland*, it was provided, that the ensigns armorial, flags, and banners of our United Kingdom of *Great Britain* and *Ireland*, should be such as we should appoint by our royal proclamation, under the great seal of our said United Kingdom: and whereas we have, by our royal proclamation dated this day, appointed and declared, that the arms or ensigns armorial of the said United Kingdom should be as therein expressed: and whereas according to ancient usage, the ensigns, flags, jacks, and pendants worn by our ships, and appointed as a distinction for the same, ought not to be worn on board any ship or vessel belonging to any of our subjects, so that our ships and those of our subjects may be easily distinguished and known: we have therefore thought fit, by and with the advice of our privy council, to order and appoint the ensign, described on the side or margin hereof, to be worn on board all ships or vessels belonging to any of our subjects whatsoever; and to issue this our royal proclamation to notify the same to all our loving subjects, hereby strictly charging and commanding the masters of all merchant ships and vessels belonging to any of our subjects, whether employed in our service or otherwise, and all other persons whom it may concern, to wear the said ensign on board their ships or vessels: and to the end that none of our subjects may presume on board their ships to wear our flags, jacks, and pendants, which, according to ancient usage, have been appointed as a distinction to our ships; or any flags, jacks, or pendants, in shape and mixture of colours so far resembling



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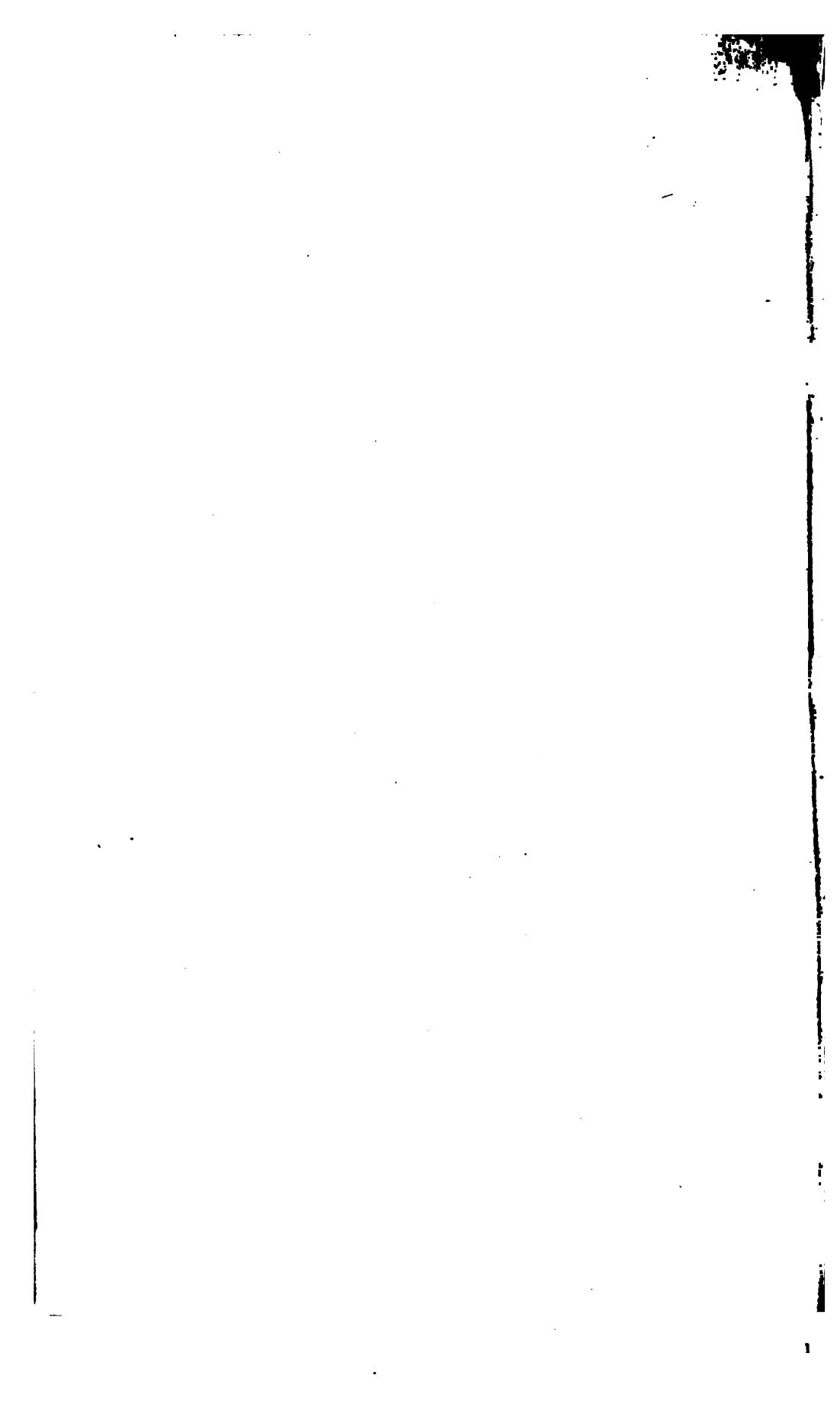
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END OF VOLUME THE THIRD.





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